THE CASE

OF

THE CHEROKEE NATION

against

THE STATE OF GEORGIA;

ARGUED AND DETERMINED AT

THE SUPREME COURT OF THE UNITED STATES,

JANUARY TERM 1831.

WITH

AN APPENDIX,

Containing the Opinion of Chancellor Kent on the Case; the Treaties between the United States and the Cherokee Indians; the Act of Congress of 1802, entitled 'An Act to regulate intercourse with the Indian tribes, &c.'; and the Laws of Georgia relative to the country occupied by the Cherokee Indians, within the boundary of that State.

BY RICHARD PETERS,
COUNSELLOR AT LAW.

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THE CHEROKEE NATION

vs.

THE STATE OF GEORGIA.

DECIDED IN THE SUPREME COURT OF THE UNITED STATES, AT JANUARY TERM 1831.

Motion for an injunction to prevent the execution of certain acts of the legislature of the state of Georgia in the territory of the Cherokee nation of Indians, on behalf of the Cherokee nation; they claiming to proceed in the supreme court of the United States as a foreign state against the state of Georgia; under the provision of the constitution of the United States, which gives to the court jurisdiction in controversies in which a state of the United States and the citizens thereof, and a foreign state, citizens, or subjects thereof, are parties.

The Cherokee nation is not a foreign state, in the sense in which the term "foreign state" is used in the constitution of the United States.

The third article of the constitution of the United States describes the extent of the judicial power. The second section closes an enumeration of the cases to which it extends, with "controversies between a state or the citizens thereof, and foreign states, citizens or subjects." A subsequent clause of the same section gives the supreme court original jurisdiction in all cases in which a state shall be a party—the state of Georgia may then certainly be sued in this court.

The Cherokees are a state. They have been uniformly treated as a state since the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. Laws have

been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state; and the courts are bound by those acts.

The condition of the Indians in relation to the United States, is perhaps unlike that of any other two people in existence. In general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is with strict propriety applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.

The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy; until that right shall be extinguished by a voluntary cession to our government. It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.

The bill filed on behalf of the Cherokees seeks to restrain a state from the forcible exercise of legislative power over a neighbouring people asserting their independence; their right to which the state denies. On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self government in their own country by the Cherokee nation, this court cannot interpose, at least in the form in which those matters are presented. That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possessions, may be more doubtful. The mere question of right might perhaps be decided by this court, in a proper case, with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may well be questioned. It savours too much of the exercise of political power, to be within the proper province of the judicial department.

ON the 27th of December 1830 and 1st of January 1831, a notice was served on the governor and attorney general of the state of Georgia, signed by John Ross, principal chief of the Cherokee nation, stating that on Saturday the 5th day of March 1831, at the city of Washington, in the district of Columbia, the Cherokee nation would, by their counsel, move the supreme court of the United States, expected to be then in session, for an injunction to restrain the state of Georgia, the governor, attorney general, judges, justices of the peace, sheriffs, deputy sheriffs, constables, and all other the officers, agents and servants of that state, from executing and enforcing

the laws of Georgia or any of those laws, or serving process, or doing any thing towards the execution and enforcement of those laws within the Cherokee territory, as designated by treaty between the United States and the Cherokee nation.

The notice also stated, that the motion would be made on the grounds set forth in a bill, a copy of which was handed to the governor and attorney general of the state of Georgia, with the notice; which bill would be supported by the necessary affidavits and documents.

On the day named in the notice, Mr Sergeant and Mr Wirt appeared as counsel, on behalf of the Cherokee nation—and moved the court for an injunction, as stated in the notice. The state of Georgia did not appear.

The bill and a supplement to the bill were as follow:

To the Honourable the Chief Justice and the Associate Justices of the Supreme Court of the United States, sitting in chancery.

Respectfully complaining, show unto your honours, the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to any state of this union, nor to any other prince, potentate, or state, other than their own:

That, from time immemorial, the Cherokee nation have composed a sovereign and independent state, and in this character have been repeatedly recognized, and still stand recognized by the United States, in the various treaties subsisting between their nation and the United States.

That, long before the first approach of the white men of Europe to the western continent, the Cherokee nation were the occupants and owners of the territory on which they now reside; deriving their title from the Great Spirit, who is the common father of the human family, and to whom the earth belongs.

That on this territory they and their ancestors, composing the Cherokee nation, have ever been, and still are, the sole and exclusive masters, and governed, of right, by no other laws, usages and customs, but such as they have themselves thought proper to ordain and appoint.

That, in the year of the Christian era one thousand seven hundred and thirty-two, the monarch of several islands on the eastern coast of the Atlantic ocean, under the name and style of George II. king of Great Britain and Ireland, by a charter

to a company of his own subjects there residing, affected to grant to them all the country on this continent lying between the Savannah and Alatamaha rivers. That this country was, at that time, occupied and owned by several distinct sovereign and independent nations of Indians, and, among others, by the Cherokee nation; and that the monarch who affected to grant it had no title to it whatever. These complainants are informed, and believe, that the only title to which he pretended was derived from the circumstance, that a ship manned by his subjects had, about two centuries and a half before, sailed along the coast of the western hemisphere, from the fifty-sixth to the thirty-eighth degree of north latitude, and looked upon the face of that coast without even landing upon any part of it. This, they are informed and believe, has been called a title *by first discovery;* which is not true, even in point of fact, as against the Cherokee nation and other Indian nations: for they had discovered and occupied it long before the first European ship had ventured to cross the Atlantic ocean; the time of their original discovery and settlement of it being buried in the night of ages beyond the era of Christianity, and probably far beyond the period when the British islands, themselves the residence of heathen savages and barbarians, became a prey to a heathen conqueror from Rome.

That this pretended title by prior discovery, whatever may be its effect on the equally pretended claims by discovery of other European sovereigns, can have no effect in divesting the prior title of the Indian occupants and settlers of this country; and, as they are informed and believe, has never been pretended, by the European sovereigns themselves, to give them a right to oust the Indian proprietors from their possession. That the utmost length to which they have carried the unjust pretensions derived from their alleged discovery, is, that the first European discoverer has the prior and exclusive right to purchase these lands from the Indian proprietors, as against all other European sovereigns; a principle settled among themselves for their own convenience, in adjusting their mutual accounts of rapine on the western world; a principle to which the Indian proprietors have never given their assent, and which they deny to be a principle of the natural law of nations, or as in any manner obligatory on them.

That, whatever may be the theory of this wild and chimerical title by discovery, as among the European sovereigns themselves, these complainants are informed and believe, that it was never alleged by George II. the king of Great Britain and Ireland, or by his aforesaid grantees, the Georgia company, in 1732, or at any time since, that the charter so granted gave to that company any right to disturb or to question the exclusive right of possession by the Indians, or to interfere in any manner with their own self government within their respective dominions. That, on the contrary, the first adventurers under that charter, on their landing at the present site of the city of Savannah, entered into a treaty with the Creek nation of Indians, who were admitted to be the proprietors of the lands in that quarter of the country covered by the aforesaid charter, and received from them a voluntary cession of a part of those lands for a valuable consideration; and the Creeks were left under the peaceable government of their own laws, no pretension having been then, or at any subsequent time, set up, that the charter conferred on the grantees any authority to introduce the system of British laws into the country owned by the Indians. That various treaties have been, from time to time, made between the British colony in Georgia, between the state of Georgia, before her confederation with the other states, between the confederated states afterwards, and, finally, between the United States under their present constitution, and the Cherokee nation, as well as other nations of Indians; in all of which the said Cherokee nation and other nations have been recognized as sovereign and independent states, possessing both the exclusive right to their territory and the exclusive right of self government within that territory. That the various proceedings from time to time had by the congress of the United States, under the articles of their confederation, as well as under the present constitution of the United States, in relation to the subject of the Indian nations, confirm the same view of the subject; in evidence of which these complainants refer to the printed journals of their proceedings, and pray that they may be taken and considered as part of this bill. These complainants also pray leave to refer, as part of this bill, to the following treaties between the United States and the Cherokee nation, as

published with the Laws of the United States, and forming, according to the constitution of the United States, a part of the supreme law of the land, to be administered by this honourable court, to wit: the treaty concluded at Hopewell, on the 28th of November 1785, between the commissioners of the United States, and the head men and warriors of all the Cherokees: the treaty concluded on the bank of the Holston, on the 22d of July 1791, between the president of the United States, by his duly authorised commissioner William Blount, and the chiefs and warriors of the Cherokee nation of Indians, together with the additional article thereto made at Philadelphia, on the 17th of February 1792, between Henry Knox, the secretary of war, acting in behalf of the United States, and the undersigned chiefs and warriors of the Cherokee nation; the treaty between the United States of America and the Cherokee nation of Indians, at Philadelphia, on the 26th day of June 1794; the treaty between the same parties at Tellico, on the 2d of October 1798; the treaty between the same parties at Tellico, on the 25th of October 1805; the treaty between the same parties at Tellico, on the 24th of October 1804; another treaty, between the same parties, at the same place, on the 27th of October 1805; the treaty between the same parties, made at the city of Washington, on the 7th day of January 1806; together with the proclamation of that convention by the president of the United States, and the elucidation of that convention of the 11th of September 1807; the treaty between the United States and the Cherokee nation of Indians, made at the city of Washington, on the 22d day of March 1816; another convention between the same parties, at the same place, on the same day; a treaty between the same parties, made and done at the Chickasaw Council House, on the 14th of September 1816; another treaty between the same parties, made at the Cherokee agency, on the 8th day of July 1817; and a treaty between the same parties, made at the city of Washington, on the 27th day of February 1819: all which treaties and conventions were duly ratified and confirmed by the senate of the United States, and became, thenceforth, and still are, a part of the supreme law of this land.

That, by these treaties, the Cherokee nation of Indians are acknowledged and treated with as a sovereign and independent

state, within the boundary from time to time arranged between them and the United States, accordingly as that boundary was changed by successive cessions of their land to the United States, and that within the boundary as finally adjusted by the treaty of 1819 they are still sovereign and independent, with the exclusive right of governing themselves by their own laws, usages and customs, and without any right of interference with such their self government, on the part of any one of the states composing the confederacy of the United States.

These complainants pray leave to call the attention of this honourable court to a more particular inspection of these treaties, for the purpose of verifying the truth of the general principles thus deduced from them. The fact that the Cherokees are not citizens of the United States, nor of any one of those states, is admitted by the fact of treating with them as a separate and sovereign nation; and the provisions of those treaties are such as to place this tacit admission beyond the reach of controversy. Thus the treaty of Hopewell was a treaty of peace, made to put an end to a long and bloody war, which had existed between the parties to the treaty; and the first and second articles stipulate *an exchange of prisoners*, precisely in the style of two equal sovereigns, treating under such circumstances; for example, by the first article of the treaty of Hopewell, "*the head men and warriors of all the Cherokees* shall restore all the prisoners, *citizens of the United States*, or *subjects of their allies*, to their liberty." The second article presents a corresponding stipulation by the United States; thus exhibiting *all the Cherokees* in striking contradistinction to *the citizens of the United States and the subjects of their allies*, and this feature of contradistinction, these complainants will here remark, runs through every provision of this, and of every subsequent treaty, so as to exclude the possibility of the supposition that the Cherokees were regarded as citizens of the United States, or any one of those states, or as owing, in any manner, allegiance to their laws. On the contrary, both the language of the treaties and their substantive provisions, have neither sense nor meaning, except upon the admission that the Cherokees were a separate, sovereign nation, with full capacity to treat as such, and to bind

both themselves and the United States by the terms of these treaties. Again, the eighth article of the same treaty of Hopewell contains this stipulation: "it is understood that the punishment of the innocent, under the idea of retaliation, is unjust, and shall not be practised *on either side*, except when there is a manifest violation of this treaty, and then it shall be preceded first, by a demand of justice, *and if refused, then by a declaration of hostilities;* the parties thus admitting themselves to be on an entire equality, in regard to that decisive test of sovereignty, *the right of declaring war.* Again, the sixth article of the same treaty contains a stipulation on the part of the Cherokees for the delivering up of any Indian or other person residing among them, *or who shall take refuge in their nation; who shall have committed robbery or murder, or other capital crime on any citizen of the United States;* a provision wholly idle if such refugees might be reached within the Indian nation of the Cherokees, by the laws of the United States or of any one of these states. By the fourth article of the same treaty, the boundary between the Cherokees and the citizens of the United States is designated; and the same article proceeds to stipulate, that if any citizen of the United States shall attempt to settle on any of the lands within that boundary, he shall forfeit the protection of the United States, and *the Indians may punish him or not, as they please.* Without detaining your honours with a farther specification of the provisions of that treaty, by a detailed reference to each and every article, as admitting their exclusive sovereignty, and their authority to give the law within their own territorial limits, these complainants refer again to the provisions at large, both of that and of all the other treaties above enumerated. These complainants show further to your honours, that the second of the treaties above enumerated, that of Holston, was made by and with the previous advice and consent of the senate of the United States; in support of which, they refer to the message of the president Washington to that body, in August 1790, and their answer thereto, as extracted from the journals of the senate of the United States; a copy of which was annexed and made part of the bill. This treaty of Holston, entered into by the United

States, after the adoption of the present constitution of the United States, and under the double solemnity of a previous consultation with the senate, and their subsequent ratification of the treaty, contains the recognition of every feature of the separate sovereignty of the Cherokee nation, which is to be found in the treaty of Hopewell, and other additional ones of a character equally decisive; to all which these complainants pray the special reference of your honours. The eleventh article, particularly, contains a distinct admission, that *the territory of the Cherokee nation is not within the jurisdiction of either of the states or territorial districts of the United States.* And by the seventh article, "the United States solemnly guaranty to the Cherokee nation all their lands not hereby ceded."

These complainants show farther unto your honours, that the United States of America, from their earliest intercourse with the Cherokee nation, have evinced an anxious desire to lead them to a greater degree of civilization, and to induce them to become *herdsmen* and *cultivators*, instead of remaining in their original *hunter* state. Of this fact the fourteenth article of the said treaty of Holston furnishes evidence, which will be found to be followed up in all the subsequent treaties before referred to, in all the messages of the president of the United States to congress touching the Indian tribes, and in all the correspondence of the executive department of the United States with the agents, from time to time, established under the authority of treaties with those nations. With the Cherokee nation those humane and generous efforts were so far successful, that many of them had already commenced agricultural pursuits, when in the year 1808 they sent a double deputation to the city of Washington; *that*, from the upper towns, to declare to the president of the United States their anxious desire to engage in the pursuits of *agricultural and civilized life, in the country they then occupied*, and to make known to him the impracticability of inducing the nation at large to do this, and to request the establishment of a division line between the upper and lower towns; and the deputies from the lower towns to make known their desire to continue the hunter life, and also the scarcity of game where they then

lived, and under these circumstances, their wish to remove across the Mississippi river, on some vacant lands of the United States. To both these deputations, the president gave a favourable answer: declaring that those who chose to remain for the purpose of engaging in the pursuits of *agricultural and civilized life, in the country they then occupied*, might be assured of the *patronage, aid, and good neighbourhood of the United States;* and providing the means, also, of gratifying those who wished to remove to the west of the Mississippi, to continue the hunter state. In consequence of this arrangement, a part of the Cherokee nation did remove to the west of the Mississippi, while the far larger portion of them did remain to engage in the pursuits of agriculture and civilized life in the country they then occupied. On the 8th of July 1817, the before mentioned treaty at the Cherokee agency was made; the preamble of which recites the promises just stated as having been made by the president of the United States in 1808, 1809, and declares that that treaty is made *for the purpose of carrying into full effect the before recited promises with good faith;* and in full reliance on this good faith, a large cession of their lands was thereby made by the Cherokee nation. For the same purpose, and in final and complete execution of that purpose, the before mentioned treaty of the 27th of February 1819 was made at the city of Washington; reciting in the preamble thereto, that *a greater part* of the Cherokee nation had expressed an earnest desire to remain on this side of the Mississippi, and were desirous *to commence those measures which they deem necessary to the civilization and preservation of their nation;* to give effect to which object, without delay, that treaty was declared to be made, and another large cession of their lands was, thereby, made by them to the United States.

By reference to the several treaties before enumerated, it will be seen by your honours, that among other proofs of the earnestness of the United States to promote civilization among your complainants, a fund is provided for the establishment of *schools*. And your complainants show farther unto your honours, that, in full reliance on the sincerity and good faith of the United States, and grateful for the humanity so often and so zealously expressed in their behalf, the Cherokee nation

have made great progress in civilization and in agriculture. They have established a constitution and form of government; the leading features of which they have borrowed from that of the United States; dividing their government into three separate departments, legislative, executive and judicial. In conformity with this constitution, these departments have all been organized: they have formed a code of laws, civil and criminal, adapted to their situation; have erected courts to expound and apply those laws, and organized an executive to carry them into effect. They have established schools for the education of their children, and churches in which the Christian religion is taught; they have abandoned the hunter state and become agriculturists, mechanics, and herdsmen; and, under provocations long continued and hard to be borne, they have observed, with fidelity, all their engagements by treaty with the United States.

They have understood that some of their white brethren, citizens of the United States, have sometimes indulged in speculative objections to their title to their lands; on the ground that they are mere savages, roving over the surface of the earth in quest of game, having never appropriated the soil to themselves by incorporating their own labour with it, and turning it to the purpose for which the God of nature intended it—of supporting the greatest practical amount of human life. Even if this hypothesis of fact were true, how such an objection could stand with those solemn treaties by which their boundaries have been designated, and their lands within those boundaries guarantied to them by the United States, they find themselves utterly unable to comprehend. Nor have they yet been informed how their white brethren have ascertained that this earth was designed only for the purpose of agriculture, and that no title could be acquired to any portion of it in any other manner than by actually digging into its bowels; nor how digging into one part of it can give a title to hund and thousands of miles, at a distance from the part th They are still more confounded in attempting to reconcile this theory of a title derivable only from cultivation, with the alleged title by discovery arising simply from sailing along the coast, at several miles distance from the shore, without even touching the land: and finally, they are equally perplexed

in reconciling this theory with the title which the United States themselves assert to the untouched millions of acres which lie between their settlements and the Pacific ocean; over which their people have never even chased their game, nor seen them from the distant mountain tops. But whatever foundation there may be for this theory, so unintelligible to your complainants, and so entirely inconsistent with the title which they see asserted against the aborigines of this country, it is no longer true in point of fact with regard to these complainants; for they are no longer savages nor heathens in the hunter state. Under the promised "*patronage*, *aid*, and *good neighbourhood*" of the United States, they have become *civilized*, *Christians*, and *agriculturists*, and have no more land than is sufficient for their subsistence and that of their posterity, and this land they hold under repeated, solemn, and still subsisting guarantees by treaty with the United States. They do not mean to allege, that they have all become perfectly civilized, nor all public professors of Christianity, nor all agriculturists: but in all these respects they are willing that a comparison shall be instituted between them and their white brethren around them, and they are very little apprehensive of suffering by such comparison when instituted before this honourable court. If practising justice, and the doing to others as we would have them do unto us, be the tests of civilization and Christianity, and the proportion of the cultivators of the soil to the whole number of the population be the test of the agricultural character of a nation, with reference to the theory in question, they apprehend that they have at least as little reason as their white brethren around them to shrink from such tests.

These complainants show farther unto your honours, that, by the constitution of the United States (to which they pray leave to refer as part of this bill), it is, among other things, provided, that all treaties made, or to be made, under the authority of the United States, shall compose a part of the supreme law of the land, and it is further thereby declared, that the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

That by the same constitution it is further declared, that no state shall pass any law impairing the obligation of contracts;

and these complainants aver, that all the treaties aforesaid are contracts of the highest character, and of the most solemn obligation.

The same constitution further provides, that the congress of the United States shall have power to regulate commerce with the Indian tribes; a power which, from its nature, is exclusive, and consequently forbids all interference by any one of the states.

These complainants further show unto your honours, that, in execution of this latter power, the congress of the United States have, from time to time, passed various acts for the regulation of that commerce, and among others the act of 1802, "to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers;" to all of which these complainants beg leave to refer, and to pray that they also may be taken as part of this bill. The great object of these laws is to consecrate the boundary arranged by treaty between the Indians and the citizens of the United States; and every provision is marked with the clearest recognition of the sovereignty of the Indians, and their exclusive right to give and to execute the law within that boundary.

These complainants show farther unto your honours, that, in violation of these treaties of the constitution of the United States, and of the act of congress aforesaid, the state of Georgia, one of the United States of America, at a session of her legislature, held in December in the year 1828, passed an act, which received the assent of the governor of that state on the 20th day of that month and year, entitled, "an act to add the territory lying within this state and occupied by the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall, and Habersham, and to extend the laws of this state over the same, and for other purposes;" a copy of which act, authenticated under the seal of the said state, these defendants herewith exhibit, and pray that it may be taken and considered as a part of their bill. That afterwards, to wit in the year 1829, the legislature of the said state of Georgia passed another act, which received the assent of the governor on the 19th December of that year, entitled, "an act to add the territory lying within the chartered limits of Georgia, now in the occupancy of the Cherokee Indians, to the counties of Carroll, De Kalb,

Gwinett, Hall, and Habersham, and to extend the laws of this state over the same, and to annul all laws and ordinances made by the Cherokee nation of Indians, and to provide for the compensation of officers serving legal processes in said territory, and to regulate the testimony of Indians, and to repeal the ninth section of the act of 1820 on this subject;" of which last act a copy, duly authenticated, is also herewith exhibited, and these complainants pray that it may be taken and considered as a part of their bill.

That by these laws the state of Georgia professes to parcel out the territory, which belongs exclusively to these complainants, and is guarantied to them by the aforesaid treaties, among the several counties named in the title of the lands; to extend all the laws of Georgia, both civil and criminal, over the whole of the said territory; to abolish all the Cherokee laws and ordinances therein; and to declare that in all cases of indictment and civil suits, it shall not be lawful for the defendant Cherokee to justify under any of these laws; and the courts of the state are forbidden to permit those laws to be given in evidence; to make it unlawful for the Cherokees to attempt to prevent the *individuals* of their own nation from enrolling for emigration, under the penalty of indictment and punishment before the state courts of Georgia; to make it unlawful in the Cherokee nation to prevent the *individuals* of that nation from selling or ceding their lands to the United States, for the use of the state of Georgia (whereas your complainants aver, that, by the Cherokee laws, there is no such thing as individual title to land in the Cherokee country; but the whole of these lands, according to their laws, belong to the entire nation, as a nation, and can be sold or ceded by them only in their national capacity); to make it murder in the executive, ministerial, or judicial officers of the Cherokee nation to inflict sentence of death, though in conformity with their own laws, and declaring all those officers, so concerned in carrying their own laws into effect, principals, and subjecting them all to indictment therefor and death by hanging; extending the jurisdiction of the justices of peace of the state of Georgia into the Cherokee territory, and authorising the officers who shall carry their process for service, to call out the militia of the state to overcome resistance; and finally,

declaring that no Indian, or descendant of any Indian, residing within the Cherokee nation of Indians, shall be deemed a competent witness in any court of the state of Georgia, in which a white person may be a party, except such white person resides within the said nation.

These complainants aver that both these laws of the state of Georgia are null and void, because they are repugnant to the aforesaid treaties, which are yet subsisting and in full force between the United States and the Cherokee nation; because they are also repugnant to the constitution of the United States, in the provisions before referred to as contained in that instrument; and because they are repugnant to a law of the United States, to wit the law before mentioned as having been passed in the year 1802, entitled, "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

These complainants further show unto your honours, that, by the aforesaid treaty of Hopewell, the Cherokees acknowledged themselves to be under the protection of the United States of America, and of no other sovereign whatever. That a number of white men, citizens of the United States, having intruded into the Indian territory, beyond the boundary established by that treaty, president Washington, in his message before mentioned to the senate of the United States, adverting to that fact, declared it to be his determination to execute the power entrusted to him by the constitution of the United States, to carry that treaty into faithful execution by the removal of the white intruders, unless a new boundary should be arranged by treaty, excluding from the Indian territory those intrusive settlements; thereby avowing his opinion that, as the president of the United States, he possessed the power, and was constrained by his official duty to enforce, in behalf of the Cherokees, the protection secured to them by that treaty.

These complainants show farther unto your honours, that by the second article of the treaty of Holston, before referred to, the Cherokee nation again acknowledged themselves to be under the protection of the United States of America, and of no other sovereign whatsoever; and stipulated that they would not hold any treaty with any foreign power, *individual state*,

or *with individuals of any state;* a stipulation with which they have faithfully complied on their part, and that protection has been, in the main, extended to them, as well as was perhaps practicable, down to the year 1829.

They show farther unto your honours, that they are informed and believe, that, in the year 1802, the state of Georgia ceded to the United States a large body of lands alleged to be within her chartered limits, upon several conditions, one of which was, that the United States would extinguish, for the use of Georgia, the Indian title to the lands within her remaining limits, "as soon as it could be done peaceably, and on reasonable terms;" the state of Georgia thus admitting that the Indian title was a subsisting title, which remained to be extinguished, and that it could be properly extinguished only *peaceably* and on *reasonable terms, by the United States.* This stipulation must be considered as referring to the uniform practice which had always prevailed in extinguishing that title, and to be construed and expounded by that practice; and that uniform practice had been to extinguish the Indian title by peaceable treaties held with the Indian nations *in their national character;* in which terms were offered, accepted, rejected, or modified, at the pleasure of those nations, nothing being forced upon them. That the Cherokee nation went on amicably to meet the wishes of the United States and of the state of Georgia, by ceding, from time to time, as much of their lands as they could spare, until, by the cession of 1819, they had reduced their territory into as small a compass as their own convenience would bear; and they then accordingly resolved to cede no more. That the state of Georgia; although she already possesses millions of acres more than her people can cultivate, becoming impatient for the lands owned by your complainants, and forgetting her own stipulation with the United States that the Indian title was to be extinguished peaceably and on reasonable terms; pressed upon the United States (as your complainants are informed and believe) the obligation of extinguishing the title at once, with an intimation that she expected the application of force to the Indians, if necessary for the accomplishment of her object, and with a menace that if the United States withheld it, she would herself apply that force and expel your complainants from their

possessions. In the course of that correspondence the state of Georgia (as your complainants are informed and believe) reproached the United States with unfairness in those measures which had been so humanely adopted to civilize your complainants, and to turn them from the hunter state to that of agriculturists and herdsmen, under a regular government and laws of their own; which, she alleged, had had a tendency to attach them to the soil, and to disincline them to cede it for the use of Georgia; and although, in her capacity of one of the states of the United States, she had been a party to all the treaties which had those measures in view, and had reaped the fruits of these treaties, by the large cessions which she had, from time to time, received of the Indian lands; and although she had been also a party to all those acts of congress which had looked to the accomplishment of the same humane and benevolent objects, from the time of the adoption of the present constitution of the United States until she had gained the last cession under the treaty of 1819; she now affected to treat those measures; consecrated as they were by the names of the best patriots of the United States, and sanctioned by herself; as a tissue of hypocritical pretences of benevolence and philanthropy, which had no other object in view than to disappoint her own just hopes of engrossing to herself all the Indian lands within her remaining limits. These complainants have understood and believe, that presidents Monroe and Adams, in succession, understanding the articles of cession and agreement between the state of Georgia and the United States, in the year 1802, as binding the United States to extinguish the Indian title so soon only as it could be done *peaceably* and on *reasonable terms;* refused, themselves, to apply force to these complainants, or to permit it to be applied by the state of Georgia, to drive them from their possession; but, on the contrary, avowed their determination to protect these complainants by force if necessary, and to fulfil the guarantee given to them by the aforesaid treaties.

That the state of Georgia, disappointed in this her unjust design upon these complainants and their territory, resorted, in the next place, to the scheme of legislation before set forth, expecting, as your complainants believe, to accomplish, by the moral force of her laws, that expulsion of them from

their territory which she had been prevented by the just and honourable interference of the United States from effecting, or attempting to effect at the point of the bayonet. Your complainants, unwilling to resist by force of arms, if it could be avoided, the unjust and unlawful pretension of the state of Georgia to parcel out their territory among her neighbouring counties, and to extend her laws by compulsion over them, have applied to the present chief magistrate of the United States to make good the protection and guarantee pledged to them by treaty with the United States; but, to their great surprise and regret, have received for answer from that chief magistrate, that the president of the United States has no power to protect them against the laws of Georgia.

Your complainants beg leave to show farther unto your honours, that, at the last session of the congress of the United States, an act was passed, entitled, "an act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi." By this act the president of the United States is authorised to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may *choose* to exchange the lands where they now reside, and remove there; but there is a proviso annexed to this act, which declares that nothing therein contained shall be construed as authorising or directing the violation of any existing treaty between the United States and any of the Indian tribes.

Under this act overtures have been made to your complainants to give them in exchange for their lands, others to the west of the Mississippi. These overtures, as it was their right to do, they have declined. They prefer to remain on their present lands, and to insist on their rights under their various treaties with the United States.

As a sovereign and independent state, it would be enough for them to say, that they do not choose to make the proposed exchange, without assigning any other reason therefor—than their *non*-pleasure. But as this offer of exchange has been

held up before the world as an evidence of great humanity towards these complainants, and as the happiest means that could be devised to save them from that extinction, which it is supposed that Indian tribes are fated to experience, from the approach and "good neighbourhood" of white population; and as your complainants are not disposed to be considered, either as so stupid as to be blind to their own best interests, or so contumacious as to resist, through mere obstinacy, the desire so strongly expressed by their brethren of Georgia, for their expulsion; they beg leave to state, in a few words, the motives that have induced them to decline this offer of exchange.

In the first place, the territory which they now inhabit is well known to them, and has been found well adapted to all their wants. It has been opened, improved, settled, built upon and placed in a condition for agriculture, which they are now prosperously carrying on. It is well supplied with wood and water, enjoys a salubrious climate, and every convenience of commerce and intercourse suited to a civilized people, composed of farmers, planters, mechanics and herdsmen. The ports of the United States are all within the reach of those exchanges which their pursuits make necessary for their prosperity. They have schools established for the education of their children, and the means of furnishing them with instructors from among the citizens of the United States: they have places of religious worship established, in which the Christian religion is peaceably taught by missionaries and pastors, easily supplied from the United States, and the word of God is prospering among them; they have learned to relish the manners and pursuits of civilized life; and, if their treaties with the United States shall be faithfully executed, they have continually brightening prospects of becoming, speedily, as civilized, as enlightened, and as Christian as the best portion of their white brethren. This country, too, so fraught with every convenience and advantage to them; and so endeared to them by the great and multifarious benefits which they have already received and are still receiving from it; is consecrated in their affections from having been, immemorially, the property and residence of their ancestors, and from containing, now, the graves of their fathers, relatives and friends. Such

are the grounds of their attachment to this country, and of their unwillingness to relinquish it.

On the other hand, they know little of the country offered to them in exchange; but the little they do know of it convinces them, that instead of being the paradise which it has sometimes been described to be, it will become, if they accept it, the grave not only of their civilization and Christianity, but of their entire nation itself. In the first place, they are by no means satisfied that the Indian title to it has been extinguished. But let it be admitted that it is so, those who have visited that country represent it as being for the most part barren; there being but, comparatively, a small portion of it fit for agriculture. It is represented, and they believe it to be destitute, in the far greater part, both of wood and water; and therefore wholly unfit for a settlement of planters, farmers, and herdsmen. It is, also, said to be sickly. It is far removed from all intercourse with the ports and markets of the United States. And these complainants, if they could be tempted to remove, would have all their labours to commence, anew, in that distant wilderness, without any hope of remuneration. But the worst feature of the country is yet to come. It is surrounded and infested with fierce and powerful nations of Indians, in the wildest state of savage barbarity, who claim that country as their own, and wage a war of extermination on all the new tribes who enter it, and whom they consider as intruders. In evidence of this fact, these complainants beg leave to state, that their Cherokee brethren, who emigrated to the west of the Mississippi, under the patronage and sanction of the President, in the years 1808, 1809, and, subsequently, under the treaty of 1817 before mentioned, were authorized, in the first place, to settle on the river Arkansas, in the territory of the same name, where they were assured, by the fifth article of the treaty last mentioned, that they should be entitled to all the immunities and privileges of all the treaties which had theretofore been made with their nation. But the white population again growing up to them, they were required to remove again. This second removal was effected by the treaty, made at Washington on the 6th of May 1828, between the United States and the Cherokees west of the Mississippi, to which these complainants refer, and pray

that it may be taken as part of this their bill. The object of this treaty, as is alleged in the preamble, is to provide for those Indians "a *permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs for ever.*" The second article of that treaty runs thus: "the United States agree to possess the Cherokees, and to guaranty it to them for ever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows." The boundaries are then given by that article. By the third article, the United States stipulate to remove all white intruders and *others*, and to keep them off, "so that no obstacle arising out of a white population, or a population of any other sort, shall exist *to annoy the Cherokees.*" On the faith of these stipulations, their Cherokee brethren removed to their new and *permanent* home, where, in the language of the eighth article of the treaty, they were "to enjoy the repose and blessings of such a state, in the future:" and the consequence has been, as your complainants are informed and believe, that they have been delivered up to the tomahawks of the Osages, Sioux and other savage tribes, with whom they are engaged in constant scenes of killing and scalping; and have to wage a war of extermination with more powerful tribes, before whom those complainants have no hope but that they must ultimately fall. Such is the region of country to which these complainants have been invited; and such "the repose and blessings" which they have to anticipate from such an exchange. The only consequences which they could anticipate from it as inevitable, would be, first their relapse into all the habits of savage life in their own defence; and, finally and speedily, the dissolution and extinguishment of their entire nation.

With these views of the subject, they have decidedly rejected the offer of exchange, as they had a right to do; and as they had, at one time, flattered themselves that the laws of Georgia were merely held over them in terror, with the view of constraining them to accept that exchange; they had hoped that so soon as their firm and final resolution to reject it was made known, the state of Georgia would suffer those laws to fall as a dead letter, without any farther attempt to enforce them in practice. But in this hope they have been disap-

pointed. In the face, and in defiance of all the treaties that have been referred to, and in equal defiance of the constitution of the United States, and of the authority of the congress of the United States, as expressed in the before mentioned act of 1802, the territory of the complainants, consecrated by so many sanctions, has been violated, and the aforesaid laws of Georgia of 1828 and 1829 have been let loose upon them in all their terrors; and that state has declared its determination to continue to enforce them upon these complainants and upon their territory, so long as these complainants shall continue to occupy that territory.

But while these laws are enforced in a manner the most harassing and vexatious to your complainants, the design seems to have been deliberately formed to carry no one of these cases to final decision in the state courts, with the view, as your complainants believe and therefore allege, to prevent any one of the Cherokee defendants from carrying those cases to the supreme court of the United States, by writ of error for review, under the twenty-fifth section of the act of congress of the United States, passed in the year 1789, and entitled "an act to establish the judicial courts of the United States."

The constituted authorities of the state of Georgia seem to be under the impression that your complainants can have no access to the jurisdiction of this honourable court, but by writ of error from the supreme court of the United States, to the final decision of the highest court of the state of Georgia, under the aforesaid section of the judiciary act of the United States. The plan adopted, therefore, to deprive these complainants of the benefit of this jurisdiction, seems to be, and these complainants so believe and charge it to be, to harass them by the constant institution of judicial proceedings in the state courts, without carrying any one of them to final adjudication. In proof of the fact, that the design has been formed to deprive these complainants of the benefit of the jurisdiction of this honourable court, they refer to a charge delivered on the day of last, to the grand jury of county, in the state of Georgia, by the honourable Augustus S. Clayton, the judge of the western district of the state of Georgia; and to a message of his excel-

lency George R. Gilmer, the governor of the state of Georgia, delivered to the legislature of that state, on the day of last past, and which your complainants pray may be taken and considered as part of this bill.

In illustration of the unjust, illegal, and oppressive manner in which the said laws of Georgia are enforced upon them; and, at the same time, in illustration of the mode adopted to deprive these complainants and their people of the benefit of a writ of error to the final decision of the highest court of the state of Georgia, under the twenty-fifth section of the judiciary act aforesaid, these complainants beg leave to lay before your honours the following cases, which have actually occurred.

In the autumn of the year 1829, one Jesse Stanal, a white man, entered the Cherokee territory and stole a horse, the property of one of the Cherokee people; he was arrested within the Cherokee territory, tried for the offence before a regularly constituted court of the Cherokee nation, found guilty by the jury, and, in strict conformity with the Cherokee laws, was sentenced by the court to be whipped; which sentence was carried into effect. For this act, done within their own territory according to their laws, the Cherokee judge and jury were indicted by the grand jury of Hall county, in the state of Georgia, at the March term last of that court, for trespass, battery, and false imprisonment, alleged to have been committed on the said Jesse Stanal, contrary to the laws of the state of Georgia, and the good order, peace, and dignity thereof. On this indictment a warrant was issued by judge Clayton, the judge of the court of Hall county, against John Saunders, the Cherokee judge, and the Cherokee jury who tried the cause; under which warrant the Georgia sheriff of Hall county entered the Cherokee territory, and there arrested the aforesaid John Saunders, the Cherokee judge, and George Saunders, one of the jury, and transported them a distance of seventy or eighty miles to the jail of Hall county, to which they were committed, to await their trial under that indictment. The counsel retained by them filed pleas to the jurisdiction of the court, setting forth the facts of the case, and relying upon the aforesaid treaties, and intercourse law of congress. The pleas were overruled, and the prisoners tried and found guilty by the jury; whereupon errors in arrest of judgment were filed

by the prisoners' counsel, and there the prosecution stopped; the judge having not, to this day, passed judgment on the errors in arrest, and the prisoners having been admitted to bail. A copy of the record, as perfect as these complainants have been able to procure, they pray may be taken as part of this bill.

In another case, a white man, by the name of Ambrose Harmage, entered the Cherokee territory some years ago, in indigent circumstances, took the protection of its government, married a Cherokee woman, and, under the fostering care of the laws of that nation, acquired property and a large family, whose interests are identified with those of the nation. This man having entered into a mercantile partnership with two Cherokee men, named Alexander M'Coy and Leonard Hicks, fell out with them in a short time, and their controversy was, in due form, submitted to the proper tribunal of the Cherokee country, and decided against Harmage. After this he filed a bill in the superior court of Gwinett county, in Georgia, sitting in chancery, of which the before named Augustin S. Clayton was judge, in which bill, among other things, he prayed for a writ of *ne exeat*, against the said M'Coy and Hicks. The bill, with its annexed affidavit, was presented to judge Clayton, who thereupon awarded the *ne exeat*, as prayed. This writ was served by the deputy sheriff of Gwinett county, on Alexander M'Coy, a native Cherokee, at his dwelling house, in New Echota, a town of the Cherokee country, on the 20th day of August last, and, under a guard of three men, he was carried about eighty miles to the common jail of Gwinett county, where he was kept in close confinement for ten days. He was then taken out under a writ of habeas corpus, and allowed the prison bounds until the sitting of the superior court of Gwinett county on the second Monday of September, was then brought up for trial before his honour, judge Clayton, and discharged on the ground that the affidavit of the plaintiff was not sufficient to have warranted the issuing of such a writ. Your complainants exhibit as part of this bill, the copy of the original process under which M'Coy was arrested, together with his affidavit.

The same deputy sheriff who arrested M'Coy, as aforesaid, at the same time and place, arrested an elderly Cherokee woman, a married woman, under process of the state of Geor-

gia, in a plea of debt at the instance of the same Ambrose Harmage, and bore her off captive, from her husband and children, for Lawrenceville, in Georgia, a distance of eighty or ninety miles; but after having been carried about fifteen miles, she gave bail, and was permitted to return home.

In another case, a Cherokee man, named Corn Tassel, was arrested in the Cherokee territory, by process from the state of Georgia, on a charge of murder alleged to have been committed by him on another Cherokee, within the Cherokee territory; having been taken to the prison of Hall county, your complainants are informed and believe that he has demanded his trial; but that the said judge Clayton refused to try him, and has remanded him to prison; for farther deliberation.

In another case, a bill in chancery was filed, in the same superior court of Hall county, in July last, in the name of George R. Gilmer, governor of the state of Georgia, against sundry Cherokees, praying for an injunction to restrain them from digging the gold mines within their own territory, which, by the laws of that territory, they were authorised to do. In this bill, a title is asserted for Georgia to the whole of the Cherokee territory, as belonging to the ungranted and unsurveyed lands of the state of Georgia. The Cherokee mines are consequently claimed as part of those lands; and the bill being sworn to before the same judge Clayton, he awarded an injunction against the parties named in the bill as defendants, they being Cherokee citizens, enjoining and commanding them to desist from working those mines, under the penalty of twenty thousand dollars; and they were at the same time summoned to answer the bill thus filed against them in Hall county. Under the authority of this injunction, the sheriff of Hall county, supported by a colonel, a captain, and thirty or forty militia of the state of Georgia, entered the Cherokee territory, came to the gold mines, and arrested a number of the Cherokees, who were there engaged in digging gold; the persons thus arrested were, at first, rescued by the United States troops, and the sheriff and his party themselves made prisoners by those troops: but after conducting them fifteen or sixteen miles, a council of examination was held, and an exhibition of their respective authorities made, which resulted in the release-

ment of the sheriff and his party, and a declaration by the commanding officer of the United States troops, that no farther protection could be extended to the Cherokees at the gold mines, as that officer could not interfere with the laws of Georgia. The Cherokees, notwithstanding, continued their researches for gold, as they had a right to do, and were again visited by the sheriff and Georgia militia, who ordered them to desist from taking the gold of Georgia, under the penalty of being committed to jail. Some of the Cherokees replied, that they were peaceably pursuing this business on their own soil, and were unconscious of having committed any trespass on the rights of Georgia; and if it was supposed by others that they had, they were willing to abide the consequences, even if they were to go to jail; that it was unnecessary to raise the militia of Georgia to take them, as the sheriff alone could do it, if he thought proper to arrest them. In place of arresting them, however, the militia destroyed some of the machinery of the Cherokees for gleaning gold, committed some other trespasses, with their fire-arms, on the property of a Cherokee woman, and, with loud imprecations against "the poor devils" (the Cherokees), retired for that time. On the 9th day of August following, however, the sheriff of Hall county again appeared at the Chestatee gold mines, in the Cherokee territory, with a guard of four men, under process of the state of Georgia, and there arrested three Cherokees, who were peaceably and lawfully engaged in digging for gold in those mines, the property of their own nation; the charge being that these Cherokees had disobeyed judge Clayton's injunction in continuing to work at those mines. Under this arrest, these three Cherokees, to wit Elijah Hicks, Benjamin F. Thompson and Johnson Rogers, were taken, as state prisoners of Georgia, under an armed guard, were forcibly carried to the court house of Clarke county, in the state of Georgia, a distance of about seventy miles, before the aforesaid judge of the state of Georgia, Augustin S. Clayton; were, then and there, sentenced by him to pay ninety-three dollars cost, and to stand committed to prison, till paid; and were farther required, each, to give a bond, in the penalty of one thousand dollars, for their personal appearance at the next superior court of Hall county, in Georgia, on the third Monday of Septem-

ber then next ensuing, to answer to the charge of having violated that injunction, and, in the mean time, strictly to obey the same. The said Cherokees were kept in custody by the aforesaid sheriff and his guard, on that arrest, for five days. They paid the cost, and gave the bond ordered by judge Clayton, and did appear at the superior court of Hall county, on the third Monday in September, where they were discharged by his honour, judge Clayton, on the ground that the governor of Georgia could not be prosecutor in the case: but the costs which they had been required to pay were not refunded to them; nor did they receive any compensation or even apology for the lawless outrage which had been committed on their persons. In confirmation of the facts herein set forth in relation to this case, these complainants annex, as part of their bill, the copy of the bill, injunction and subpœna in the case of George R. Gilmer, governor of Georgia, against David England and others, together with the affidavits of Elijah Hicks and John Martin.

Numerous other instances might be stated of the harassing and vexatious manner in which the state of Georgia is carrying into effect her aforesaid unconstitutional laws against the persons and property of the Cherokee people, without regard to sex or age. But these cases will suffice to show that the determination is formed by the state of Georgia to carry them into full effect: and indeed this determination was solemnly announced by the governor of Georgia, by two proclamations issued by him in the month of last, of which copies are also hereto annexed, and these complainants pray that they may be taken and considered as part of this their bill.

These complainants had, at one time, flattered themselves, that if the state of Georgia should persist in enforcing these unconstitutional laws upon them, they would have been protected against such an attempt by the troops of the United States stationed in that quarter. But shortly after the arrest of the Cherokees at their gold mines, as before stated, a written notice was sent by the commanding officer of the troops to John Ross, the principal chief of the Cherokee nation, apprising him that these troops, so far from protecting the Cherokees, would co-operate with the civil officers of Georgia

in enforcing their laws upon them ; a copy of which notice is also annexed as part of this bill.

Under these circumstances your honours cannot but see that, unless you shall interpose for their protection, these complainants have before them no alternatives but these: either to surrender their lands in exchange for others in the western wilds of this continent, which would be to seal, at once, the doom of their civilization, Christianity, and national existence; or to surrender their national sovereignty, their property, rights and liberties, guarantied as these now are by so many treaties, to the rapacity and injustice of the state of Georgia; or to arm themselves in defence of these sacred rights, and fall, sword in hand, on the graves of their fathers. How far either of these catastrophes would redound to the honour and good faith of the United States, these complainants willingly submit to the arbitrament of this enlightened and honourable court. That these proceedings of the state of Georgia are wholly inconsistent with equity and good conscience, and tend to the manifest wrong and oppression of these complainants, and that they are equally violative of the good faith of those treaties to which she is herself a party, as well as of the constitution and laws of the United States, these complainants fearlessly allege: that the wrongs with which they are menaced are of a character wholly irremediable by the common law; and that these complainants are wholly without remedy of any kind, except by the interposition of this honourable court, they have as little hesitation in averring.

But they are advised that this honourable court does possess the power to interpose in their behalf. They beg leave humbly and respectfully to suggest, that by the constitution and laws of the United States, original jurisdiction is conferred on this court in controversies between a state and a foreign state, without any restriction as to the nature of the controversy; and the policy of the provision manifestly contemplates every case in which the claims or conduct of a single state towards a foreign state may jeopard the peace, safety, and good faith of the United States; in all which it is essential that the controversy should be drawn to the *forum* of the nation, instead of being decided by the prejudiced tribunals of the litigant state. By the same constitution it is provided, that that constitution,

and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and that the judges of every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. Under which last provision your complainants are advised that your honours have, on various occasions decided, that laws of particular states were unconstitutional and void, on the ground of their being repugnant to the constitution, laws, and treaties of the United States.

That your complainants are a foreign state, is not only evident by the only test which can be properly applied to such a question, the test of allegiance, but has been again and again, and still is unequivocally admitted by the United States, by the fact of their being acknowledged and treated with, in that character, by the properly constituted authorities of the United States.

They bring before your honours a question of property and of personal as well as national rights, involving liberty and life, dependent for their ascertainment on the construction of those treaties which have been declared to be the supreme law of the land.

They allege that laws have been passed by the state of Georgia, in violation of those treaties, as well as of the constitution and laws of the United States, by which the property and rights of these complainants have been wrongfully invaded and are still threatened with perpetual and irremediable invasion and final destruction.

They humbly and respectfully cláim from your honours, in the exercise of your high judicial functions, that these laws of Georgia may be declared to be void, and their execution perpetually enjoined, because they are repugnant to these treaties and to the constitution and laws of the United States; because, being thus repugnant, they violate those compacts to which the state of Georgia is herself a party; because they tend to the utter destruction of the property and dearest rights of your complainants, which stand protected by these treaties; and because they tend to compromit the peace, safety, and honour of the United States, for the preservation of which, the trea-

ties, constitution, and laws of the United States were manifestly placed under the judicial guardianship of this high and honourable court, by the constitutional declaration, that they should be the supreme law of the land, any thing in the constitution or laws of any state to the contrary notwithstanding.

Your complainants show farther unto your honours, that John Ross is the principal chief or executive head of the Cherokee nation; and that, in a full and regular council of that nation, he has been duly authorised to institute this, and all other suits which may become necessary for the assertion of the rights of the entire nation; as will appear by a copy of the legislative resolution made in the premises, and annexed as part of this bill.

In tender consideration of all which, and inasmuch as your complainants are wholly remediless in the premises, except by the interference of this honourable court: to the end, therefore, that the said state of Georgia, one of the United States of America, may be made defendant hereto, with apt words to charge her as such, and that she may, by her proper officers, according to the established forms of proceeding in this court, in like cases, true, full, and perfect answer make to all and singular the premises, as fully and particularly as if the same were herein again especially repeated, and they thereto particularly interrogated; that the said state of Georgia, her governor, attorney general, judges, magistrates, sheriffs, deputy sheriffs, constables, and all other her officers, agents, and servants, civil and military, may be enjoined and prohibited from executing the laws of that state within the boundary of the Cherokee territory, as prescribed by the treaties now subsisting between the United States and the Cherokee nation, or interfering in any manner with the rights of self government possessed by the Cherokee nation within the limits of their territory, as defined by the treaty; that the two laws of Georgia before mentioned as having been passed in the years 1828 and 1829, may, by the decree of this honourable court, be declared unconstitutional and void; and that the state of Georgia, and all her officers, agents, and servants, may be forever enjoined from interfering with the lands, mines, and other property, real and personal, of the Cherokee nation, or with the persons of the Cherokee people, for, or on account

of any thing done by them within the limits of the Cherokee territory; that the pretended right of the state of Georgia to the possession, government, or control of the lands, mines, and other property of the Cherokee nation, within their territory, may, by this honourable court, be declared to be unfounded and void, and that the Cherokees may be left in the undisturbed possession, use, and enjoyment of the same, according to their own sovereign right and pleasure, and their own laws, usages, and customs, free from any hindrance, molestation, or interruption by the state of Georgia, her officers, agents, and servants; that these complainants may be quieted in the possession of all their rights, privileges, and immunities, under their various treaties with the United States; and that they may have such other and farther relief as this honourable court may deem consistent with equity and good conscience, and as the nature of their case may require,

May it please the court to grant to your complainants the United States' most gracious writs of subpœna and injunction, commanding and enjoining, &c. &c., and these complainants, as in duty bound, will ever pray, &c. &c.

This bill was signed by John Ross as principal chief of the Cherokee nation, who made an affidavit which was subjoined to the bill, in the following terms:

Richmond County, State of Georgia, to wit:

This day came before me, a justice of the peace for the county aforesaid, John Ross, the principal chief of the Cherokee nation, and made oath on the holy evangelists of Almighty God, that the allegations of the foregoing bill, so far as they are stated as within the knowledge of the complainants, and so far also as they relate to any actings and doings that are stated as having taken place by them, or any of them, or among them, or by others among them, and in their territory, are true to the best of his knowledge and belief, and so far as they are stated on the knowledge and information of others, that he believes them to be true. Given under my hand and seal, this first day of January, one thousand eight hundred and thirty-one—1831.

JOHN ROSS, *Prin. Chief.*

ALEX. GREY RAIFORD, J. P.

SUPPLEMENTAL BILL.

The complainants beg leave to state farther to this honourable court, that, since their bill, now submitted, was drawn, the following acts, demonstrative of the determination of the state of Georgia to enforce her assumed authority over the complainants and their territory, property, and jurisdiction, have taken place.

The individual, called in that bill Corn Tassel, has been actually hung in defiance of a writ of error allowed by the chief justice of this court to the final sentence of the court of Georgia in his case. That writ of error having been received by the governor of the state, was, as your complainants are informed and believe, immediately communicated by him to the legislature of this state, then in session, who promptly resolved, in substance, that the supreme court of the United States had no jurisdiction over the subject, and advised the immediate execution of the prisoner, under the sentence of the state court, which accordingly took place.

The complainants beg leave farther to state, that the legislature of the state of Georgia, at the same session, passed the following laws, which have received the sanction of the governor of the state.

"An act to authorize the survey and disposition of lands within the limits of Georgia, in the occupancy of the Cherokee tribe of Indians, and all other unlocated lands within the limits of the said state, claimed as Creek land; and to authorize the governor to call out the military force to protect surveyors in the discharge of their duties: and to provide for the punishment of persons who may prevent, or attempt to prevent any surveyor from performing his duties, as pointed out by this act, or who shall wilfully cut down or deface any marked trees, or remove any land-marks which may be made in pursuance of this act; and to protect the Indians in the peaceable possession of their improvements, and of the lots on which the same may be situate."

This act received the assent of the governor of the state on the 21st of December 1830; and by its provisions surveyors are authorised to be appointed to go on the territory guar-

antied to your complainants by the existing treaties of the United States, and protected against such invasion by the intercourse act of congress of 1802, and to lay it off into districts and sections, which are to be distributed by lottery among the people of Georgia, reserving to your complainants only the present occupancy of such improvements as the individuals of their nation may now be residing on, with the lots on which such improvements may stand, and excepting from such reservations such improvements as your complainants may have recently made near their own gold mines. Thus the territory, which the faith and honour of the United States stand pledged by treaty, and for good and valuable consideration, to guaranty to them, is authorized to be taken from them by force, by a law of one of the states, herself a party to those treaties, and having reaped the fruits of the cessions made under their authority.

At the same session the legislature of Georgia passed another act, entitled, "an act to declare void all contracts hereafter made with the Cherokee Indians, so far as the Indians are concerned;" which act received the assent of the governor of the state on the 23d of December 1830.

By this act it is declared that no Cherokee shall be bound by any contract thereafter to be entered into with a white person or persons, nor be liable to be sued in any of the courts of law or equity of the state on such contract. And, as by a former law of the state of Georgia, the courts of the Cherokee territory are abolished, the practical result of this law will be, that as your complainants were by a former law disfranchised of the right of bearing evidence in the court of Georgia, they are now disabled to make a valid or obligatory contract with a white man; and this at a time when, by the permanent laws of the United States, white traders are authorised to come among them, to settle in their country, and trade with them, under the license of the president of the United States.

The legislature of Georgia, at its same session, passed another law, entitled, "an act to provide for the temporary disposal of the improvements and possessions purchased from certain Cherokee Indians and residents;" which act received the assent of the governor of the state on the 22d of December 1830. By this act the governor of the state is authorised to take

possession of improvements under a treaty of the 6th of May 1828, to which these complainants were not parties, but which was made between the Cherokee Indians west of the Mississippi and the United States, which improvements were never ceded or sold by these complainants to the United States, and by the laws and usages of the Cherokee country could not be ceded or sold by the individual emigrant Cherokees, and were not even intended by the treaty in question to be so ceded or sold: since by these laws and usages there is no individual property in lands among the Cherokees, but the whole belongs to the nation as a nation, the individual settler having no other right to his settlements and improvements than a right to occupy and use them so long as he pleases; and, when he is disposed to remove, a right to sell his right of occupancy and use in his improvements to some other *Cherokee*, and to no other person of any other nation. By the same act the governor is authorised to take possession of other improvements claimed by Georgia *under any other treaty*. Under these words the state of Georgia alludes to a claim which she sets up under the treaty of ——— 1817, by which the rights to certain improvements of emigrant Cherokees were held in suspense until it should be seen by the final adjustment of the boundary line between the Cherokees and the United States, on which side of that line these improvements should fall. This boundary line was finally adjusted by the treaty of 1819; yet the state of Georgia still claims the improvements which fell on the Cherokee side of this boundary; and these are the improvements of which the governor of Georgia is authorized to take possession. Thus the state of Georgia presents the spectacle of a state asserting rights under the *treaties* made by the United States with the Cherokee Indians, under her own arbitrary construction of these treaties, while, by the whole course of her legislation, deliberations, and actions, she disclaims the obligation of these treaties, setting them at open defiance, and acting as if there were no treaties in the case.

At its same session the legislature of Georgia passed another law, entitled, " an act to prevent the exercise of assumed and arbitrary power by all persons under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia, occupied by the Cherokee Indians, and to

provide a guard for the protection of the gold mines, and to enforce the laws of the state within the aforesaid territory."

This act received the assent of the governor of the state on the 22d December 1830. By this act it is made a high misdemeanour punishable by imprisonment in the penitentiary, at hard labour, for four years, for your complainants to call a council or legislative assembly in their own territory, under their own constitution and laws, framed under the patronage and encouragement of the United States, or to hold such council or assembly, or to hold any court or tribunal whatever, or to serve process or execute the judgments of their own courts, with various other provisions of a like character. White persons are excluded from the territory, unless they go under a license from the governor of the state, and take the oath of allegiance to the state of Georgia, when they are authorized to reside within the limits of these complainants. The turnpike roads and toll bridges erected by your complainants at their own expense, and under the authority of their own laws, are abolished. And the governor is authorized to station an armed military force in the territory to guard the gold mines which belong to your complainants, but to which the state of Georgia now asserts an exclusive right, and to enforce the laws of Georgia upon them.

At the same session of its legislature, the state of Georgia passed another act, entitled "an act to authorize the governor to take possession of the gold, silver, and other mines, lying and being in that section of the chartered limits of Georgia, commonly called the Cherokee country, and those upon all other unappropriated lands of the state, and for punishing any person or persons who may hereafter be found trespassing upon the mines."

This act received the assent of the governor of the state on the 2d of December 1830. By the preamble to this act the title to the mines belonging to your complainants is asserted to be in the state of Georgia. By its provisions twenty thousand dollars are appropriated, and placed at the disposal of the governor, to enable him to take possession of these mines; and it is made a crime in your complainants, punishable by imprisonment in the penitentiary of Georgia, at hard labour, for four years, to work their own mines.

Your complainants have not had it in their power to procure an authenticated copy of these several laws. Until they can do so, they beg leave to refer to them at present, as they have been published in a newspaper called the Georgia Journal, edited at Milledgeville, the seat of government of the state of Georgia, which newspaper is herewith exhibited; and they pray that they may be considered as a part of this bill.

Your complainants further show unto your honours, that, under these laws, in relation to the mines within the territory belonging to your complainants, and guarantied to them by the treaties of the United States, the governor of Georgia has proceeded to levy an armed force of the citizens of that state, who are now stationed at those mines, and who are employed according to the laws under which they have been raised, in restraining your complainants in their rights and liberties in regard to their mines, and in enforcing the laws of Georgia upon them.

And your complainants beg leave to state, as a specimen of the outrages practised upon them by this armed band, that a party of them, about twenty-five in number, having passed the night of the 9th of the last month at the house of Mr John Martin, a Cherokee citizen, and the treasurer of the Cherokee nation, and having been received and entertained in the best manner in his power, at his house at Cossewatey, within the territory, near New Echota, the capital thereof, informed him on the next morning that he was their prisoner; and, without showing any warrant, or alleging any offence committed by him against the state of Georgia, marched him off from his home and family, as a prisoner, a distance of forty-five miles, to their head quarters. There, after various unfounded reproaches and indignities, they released him and suffered him to return home.

The same party, at the time of this arrest, broke and cut down a toll gate on the federal road, leading from Georgia to Tennessee, through the Cherokee nation, which toll gate was erected under a law of the nation, and in conformity with the provisions of a treaty between them and the United States, which is now in manuscript in the nation, but not to be found among those which have been printed.

These latter transactions, with regard to the arrest of the

treasurer of the Cherokee nation, and the destruction of the toll gate, are stated on the authority of letters recently received at Washington from the principal chiefs and other respectable citizens of the Cherokee nation, and are fully believed by the delegation of the nation, now at the city of Washington, who received them, and whose affidavit is hereto annexed.

These complainants allege, that the several legislative acts, herein set forth and referred to, are in direct violation of the treaties enumerated in their bill, to which this is a supplement, as well as in direct violation of the constitution of the United States, and the acts of congress passed under its authority, in the year 1802, entitled, "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

These complainants pray that this supplement may be taken and received as a part of their bill, that the several laws of Georgia herein set forth may be declared by the decree of this court to be null and void, on the ground of the repugnancy to the constitution, laws, and treaties set forth above, and in the bill to which this is a supplement, and that these complainants may have the same relief by injunction and a decree of peace, or otherwise, according to equity and good conscience, against these laws as against those which are the subject of their bill as first drawn: and these complainants, as in duty bound, will ever pray.

Washington county, district of Columbia, sc.

This day came before me, William Hewitt, a justice of the peace for the county aforesaid, Richard Taylor, John Ridge, and W. S. Coodey, of the Cherokee nation of Indians, and made oath on the Holy Evangelists of Almighty God, that the allegations of the foregoing statements, so far as they are stated to be made on their own knowledge, are true, and so far as they are stated to be made on the information of others, they believe them to be true. Given under my hand this 5th day of March 1831.

Signed, WILLIAM HEWITT, J. P.

No proof was offered of the service of a copy of this supplemental bill on the governor or attorney general of Georgia.

[The Cherokee Nation *vs.* The State of Georgia.]

Mr Sergeant, in support of the motion for the injunction, after recapitulating the principal heads of the bill, said, that in the brief exposition to be presented of the case of the complainants, he should confine himself strictly and entirely to the judicial aspect of the question, avoiding all political considerations, and every topic which did not conduce directly to a legal conclusion. That he would endeavour still further to simplify the matter, by confining himself, as far as possible, to the very party before the court, the Cherokee nation: without wandering into the discussion of questions about Indians in general, their condition and rights, which must necessarily be vague and indefinite. Each case must at last depend, a few general principles being first settled, upon its own particular circumstances.

With this view, and within these limits, he would consider, and endeavour to establish the following propositions.

1. That the parties before the court were such as, under the constitution, to give to this court original jurisdiction of the complaint made by the one against the other.

2. That such a *case* or *controversy*, of a judicial nature, was presented by the bill, as to warrant and require the interposition of the authority of the court.

3. That the facts stated by the complainants, exhibited such a case in equity, as to entitle them to the specific remedy by injunction prayed for in the bill.

In the present stage of the inquiry, and for the purpose of this motion, the statement in the bill was to be received as true. The points before mentioned, therefore, being made out, there could be no doubt of the right of the complainants to an injunction against the state of Georgia, to issue immediately, and to continue until the coming in of an answer sufficient to dissolve it; or until it should be merged in the greater injunction upon a decree in the cause. These points he would now proceed to consider.

1. The power relied upon is contained in the second section of the third article of the constitution of the United States, limited afterwards by the eleventh amendment. "Section 2. The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, *and treaties made, or which shall be made under their authority*, &c. to controversies between two or more states, between a state and citizens of another state, between

citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens or subjects." "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make."

The first of these clauses specifies, by classification, the cases to which the judicial power of the United States shall extend, comprehending such as from the nature of the subject matter, or from the character of the parties, were proper for that jurisdiction. The second distributes the authority given by the first, among the courts of the union, assigning to cases of national jurisdiction their appropriate forum. It is subordinate to, and in execution of the former.

There can be no doubt, that under this article all cases "arising under treaties" are cases cognizable by the judiciary of the United States. They are within the very words of the article. The reason for including them is obvious, and entirely conclusive. Treaties are declared to be "the supreme law of the land." Article 6, section 2. They are placed, in this respect, upon the same footing with the constitution of the United States and acts of congress. As acts of national law, it was equally essential that the national power should be adequate to their construction and their execution, by its own exertion, without dependence upon any other authority, and with that uniformity which could only be secured by a supreme judicial tribunal. As acts of *national faith*, binding upon the honour, and involving the relations and peace of the whole nation, they had even a stronger claim to the cognizance of the national judiciary. That they are entitled to it, in some of the courts of the union, is not to be denied or disputed. The jurisdiction of this court, in its original or its appellate exercise, as certainly extends to them under the constitution.

The original jurisdiction of the supreme court, so far as concerns the present question, depends upon the fact that a

state, that is, a state of this union, is a party. It matters not who may be the other party. The dignity of *a state* entitles the case in which it is a party to the jurisdiction of the highest tribunal. Chisholm's Ex. *vs.* State of Georgia, 2 Dall. 419. State of Georgia *vs.* Brailsford, 2 Dall. 402, 415.

The eleventh amendment of the constitution does not operate, in terms, upon the original jurisdiction: but upon the judicial power of the United States, in certain cases. "The judicial power of the United States shall not be construed to extend to any case in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. Its operation upon the original jurisdiction of the supreme court is only consequential, by excluding altogether from the cognizance of the federal judiciary certain cases assigned to it by the first clause of the original article, and which in the distribution of the second clause had been made subjects of that original jurisdiction.

This amendment operates by way of limitation or exception. It applies only to the excepted cases, leaving the jurisdiction and the power, in all other cases, exactly as they stood under the original article. What are the cases specified as exceptions? They are very plainly and distinctly defined, suits against any one of the United States "by citizens of another state, or by citizens or subjects of any foreign state." With this exception, which is too plainly expressed to admit of doubt or construction, the whole of the third article remains in full force, and the jurisdictions created by it, as to their extent and distribution, are unaltered. The original jurisdiction of this court, therefore, still exists, wherever it existed before, unless it be in the case of a suit commenced against a state of the union "by citizens of another state, or by citizens or subjects of a foreign state." It is in full force where a "foreign state" is one party, and a "state" of this union is the other party, or where two states are parties. Cohens *vs.* Virginia, 6 Wheat. 264.

It has sometimes been intimated that the Cherokees are neither citizens of any "state," nor "citizens or subjects of any foreign state." Supposing for a moment that this imperfect view were correct, what would be the legal, or rather the

constitutional result of it? The limitation or exception would not apply to them; and (a state being a party) they would have a right to sue in this court, unless, indeed, it were further alleged that they were some how put out of the protection of the law, and incapacitated to sue at all, which it is believed, has never been suggested. The matter would stand thus: the case arises under a treaty, and is therefore cognizable by the courts of the union. A "state" is a party. The jurisdiction, then, among the courts of the union, belongs to the supreme court, being given to that tribunal by the constitution as originally made, and not taken away by the amendment. Such would be the result of that argument.

That question, it was admitted, did not arise here; and it was adverted to, only for the light thrown by it upon the case that was under discussion. The amendment, it was known from its history, was intended to prevent suits against "states" by individuals. Cohens *vs.* Virginia, 6 Wheaton, 406, 407. The description was meant to embrace all individuals who might sue. How are they described? By a classification understood to embrace them all; "citizens of another state" (of the union) "or citizens or subjects of any *foreign state:*" clearly showing that all who were not citizens of a state, must be in the meaning of the constitution, citizens or subjects of a *foreign state.*

The Cherokees, in this case, approach the court, not individually, but in their aggregate capacity, as "the Cherokee nation of Indians, a foreign state." The proposition asserted on their behalf is, that they are "a foreign state," with all the rights and attributes predicated of them in their bill of complaint.

In what manner is this inquiry to be *judicially* pursued? What lights are to be followed? What constitutes the *judicial* evidence of the existence of a foreign state, as such? Fortunately, we are furnished with an answer to these questions by settled and authoritative decisions, of this, the highest tribunal in the land. As to new states arising in the revolutions of the world, it is the exclusive right of governments to acknowledge them; and until such recognition by our own government, or by the government of the empire to which such new state

previously belonged, courts of justice are bound to consider the ancient state of things as remaining unchanged. Rose *vs.* Himeley, 4 Cranch, 292. Gelston *vs.* Hoyt, 3 Wheat. 324. United States *vs.* Palmer, 3 Wheat. 634. Divina Pastora, 4 Wheat. 63, and note to 65.

In matters of judgment, the ancient state, whatever it was, continues, until it is changed by a competent authority: and of that ancient state, of the changes, if any, it has undergone, the time of those changes, or its continuance to the present time, the acts of our government are authentic and decisive evidence.

Of these acts, establishing judicially the existence and character of other states and nations, the most unequivocal and conclusive must be a treaty. It is the act of the nation; in its nature, deliberate and solemn; in its obligation, most sacred; and, besides its efficacy as a national compact binding the national faith and honour, it is made obligatory upon individuals, upon authorities and upon tribunals, by the constitutional declaration that it is "the supreme law of the land."

This principle being settled, as it must certainly be conceded to be, how does it apply to the present inquiry?

From the beginning of the existence of the United States as a nation to the present time, there have been no less than fourteen public treaties made with the Cherokee nation of Indians; one under the articles of confederation, and thirteen under the constitution; all of them with the solemnities that belong to public national compacts made between independent states or nations.

The first of these treaties was made as long ago as the year 1785; and the last as recently as the year 1819.

These treaties are at the present moment in full force; and on the face of them they bear, that on the one side they are made by the United States, on the other, by the *Cherokee* nation.

In inquiring, judicially, into the fact, the first remark that presents itself is, that the aggregate existence of the Cherokees, with capacity to enter into binding *national* compacts, is *ipso facto* admitted. How can this be, if they are not a nation or state? They act by public agents, few in number, representing the aggregate or community, and binding all the

individuals of which that community is composed, in the same manner as the public agents of the United States, on the other side, contract for the whole people of the United States. How could this be, if there were not such a community or state?

But it is not by the inference only (irresistible as it is) that the fact is established. It is asserted in terms in every treaty, from the first to the last. The treaty of the 28th November 1785 expressly styles them a "nation." Sect. 6. In the succeeding treaties, the same description is applied in almost every line, as any one who will be at the trouble to examine them will perceive. See particularly the preamble of the treaty of Holston, Art. 1, and the treaty of Washington in 1819.

The subjects, too, of these treaties are unequivocally of national character and concernment: war; peace; exchange of prisoners; national limits; mutual rights, which nations only could claim or enjoy; and mutual duties, which nations only could fulfil.

The obligations are national; the sanctions are national; the breach is national: and the impress of national character, as belonging to the Cherokee Indians, is thus deeply and inseparably fixed upon the treaties in every variety of way, and with them transferred to our statute book as a part of the "supreme law of the land." Whatever others may say, so long as these treaties remain in force, the Cherokee Indians are, by our laws, a state or nation.

It was not now a question, what the United States might heretofore have done, or what they may do hereafter. That belonged properly to another head of inquiry. The present purpose was only to inquire *judicially* into the fact as now existing, according to the established principle already stated.

Following the rule of interpretation, or rather, of evidence, thus established, were not the Cherokee Indians a "*foreign* state," within the meaning of the constitution? It would be sufficient to answer, that they certainly are not a state of this union. What then can they be but a foreign state? The constitution knows of but two descriptions of states, domestic and foreign. Those which are not included in the former class must necessarily fall into the latter. Nothing can be clearer

than this; following either the language or the meaning of the constitution. There is no third description in that instrument; and there is no case of *a state*, which was not intended to be within the scope of its judicial authority, whenever circumstances might make it a duty to ourselves or to others to interpose its exercise. It is true that the Cherokee nation have no part or right in the constitution of the United States, because they are a *foreign* state, and that constitution is the compact only of the states and citizens of this union. But there is a power given by the constitution which they may invoke when they have a demand of justice; a power conferred upon the authorities of the union, and in its nature conclusive. What reason can be given why it should not equally extend to them as to all other states.

The constitution itself created no new state of things. It operated upon a state then existing, and of very long standing. From the first settlement of the country by Europeans, the Cherokees existed as an independent nation. They never became *incorporated* with the European settlers, nor *subjected* by them. It is only by one of these modes, or by utter extinction, that they could cease to exist as a nation. Such as they were at the first, such they have continued to be, and such they now are. If any change has ever taken place in their condition, and especially one so material as to destroy their independent national character, it is for those who assert it to show when, and how, this great change was effected. The *history* of the case is in this respect the *law* of the case. In what part of their history is it to be found? The European claim of discovery never asserted their subjection or extinguishment as its consequence. It asserted nothing in respect to them. It only fixed the limits of the pretensions of different European states or sovereigns between themselves; each maintaining an exclusive right to what he had discovered, and within his discovery to deal with the natives according to his own will, without interference by the others. The conduct of one was no rule or law to his neighbour, except as it evidenced the common consent to abstain from interference. Each was the absolute master of his own conduct, and made the law for himself within his own limits. If he had strength enough to do so, he made the law for the native inhabitants according

to his own will and pleasure, with more deference to the suggestions of his own passions and appetites than to the dictates of justice or of mercy. In some portions of the discovered hemisphere they were hunted with blood hounds and exterminated. Whole races of men have long since disappeared from the face of the earth which they occupied. In others, their soil was forcibly seized by the invaders, and the native inhabitants became the slaves of their conquerors. Where these things happened, nations, of course, ceased to exist. Such was, then, the stern policy of the discoverer. But that is not our case.

He would not enter now into a discussion of the abstract question of right as it stood between the European discoverers and the native inhabitants, nor attempt to set up here, on behalf of the latter, rights which (however they might have stood upon original grounds) were now to be no otherwise considered in a judicial tribunal, than as they had been settled by a long course of time and practice, and by judicial decisions, including a decision of this court, to which he should hereafter refer. He was satisfied to take the matter as he found it; to disturb nothing that was past or settled, but to inquire simply into the fact, as it was when the constitution was made, and as it still is.

With this view he proceeded to state, that the claim of Great Britain never asserted the incorporation or subjection of the native inhabitants within her discovery, nor the extinguishment of their national existence and character. It was always a limited claim, and left to them all beyond its limits. See Johnson *vs.* M'Intosh, 8 Wheat. 543. With the exception of this limited claim, and what has since been yielded by treaty, the Cherokee nation of Indians is the same nation now, that it was when the soil of their country was first pressed by the foot of an European. They occupy this moment a portion of the very territory which then acknowledged their authority. Successive revolutions have changed the parties on the other side; but each in succession has claimed the rights and acknowledged the obligations of its predecessors. The acknowledgement has never been questioned of their existence as an independent *foreign* state; on the contrary, it has been continually, habitually, and uninterruptedly repeated and

confirmed, so that from the beginning to the present day there is one uniform current of authentic testimony, without the slightest semblance of contradiction.

Thus, the constitution of the United States found the Cherokee nation at its establishment—a state, not of the union, and yet a state. What could it be but a *foreign* state?

It was not necessary, for the present purpose, to go back to the numberless treaties made with the Cherokees before the revolution. By whomsoever made, they were uniform in their admission, express and implied. History, too, is uniform in attesting their existence as a foreign state, composed of foreigners, owing no allegiance to the crown of England, to the colony, to the state, or to the union.

When the confederation of these states was formed, where was this subject arranged? Among the *foreign* subjects which were of national concern, and to be dealt with and managed by the national power. There could have been no doubt; for if there had been, that jealousy which yielded nothing but to the most evident necessity, and even withheld much which a short experience proved to be indispensable; would not have conceded this. But it was conceded. Congress had the power of "entering into treaties and alliances."

They had the power also of "regulating the trade and managing all the affairs of the Indians." Under these powers the treaty of Hopewell was made in the year 1785, between the United States on the one side and the Cherokee Indians on the other, and mutual faith was solemnly pledged between parties admitted to be competent to contract as nations.

This was the state of things when the constitution of the United States was formed to establish a more perfect union. Can any thing be stronger to fix the construction of that instrument upon the point in question? A treaty with the Cherokee Indians, made under the authority of congress, within two years only from the time when the convention completed its labours, was already in the statute book, and was one of the treaties "made" which that constitution declared should be the "supreme law of the land," attesting the existence of the nation, as a foreign state, and its competency in that capacity, though within the limits of a state or states of this union, to

contract with the United States. Besides its other sanctions—sufficient if public faith be regarded—this treaty has the sanction, in a peculiar manner, of the constitution itself.

Nor had this state of things arisen from haste and inconsiderateness, or the want of due deliberation. Even before the confederation was formed, congress had assumed and exercised authority over this subject, as one which naturally belonged to them. Journals of 13th July and 16th December 1775: January 27th, March 8th, April 10th, 29th, May 27th, June 11th, 1776; August 19th, September 19th, December 7th, 1776. In the last mentioned year (1776) they made war upon the Cherokees for committing hostilities on South Carolina. Journals December 2d, 1777. They distinctly asserted the power of war and peace towards the Indians, and denied it to the states. Journals 5th March 1779. In 1781 they sanctioned a negotiation for peace with the Cherokees. Journals 1st November 1781. From this negotiation proceeded the treaty of Hopewell (1785), the provisions of which are set out in the bill. In 1788, congress by proclamation, declared their determination to protect the Cherokees, and if necessary to use force for that purpose. Journals 1st September 1788. In 1787 the attention of congress had been forcibly and particularly drawn to the subject of their own power. The states of Georgia and North Carolina had raised a question about the construction of the articles of confederation (which were not in this respect altogether free from obscurity); and Georgia had actually proceeded to treat with the Creeks. The matter was referred to a committee, consisting of a member from Massachusetts, New York, Pennsylvania, Delaware and Virginia. They made a report (12 Journals, 82) on the 3d August 1787; in which the question was fully examined, and the power of congress asserted and maintained. The clause in the articles of confederation, upon which the doubt had been raised, was as follows, "congress shall have the sole and exclusive right and power of regulating the trade and managing all affairs of the Indians, not members of any of the states; *provided that the legislative right of any State within its own limits be not infringed or violated.*" Upon this proviso, the pretensions of the states were founded. Whatever may have been the merits of this controversy, it was for ever ended by the constitution

of the United States, which omitted the limitations in the articles of confederation, and gave the power to congress unfettered, and (to use the language of the report before mentioned) "indivisible." That this was purposely and deliberately done, we have the authority of Mr Madison in the Federalist, No. 42. So that by the constitution of the United States, all Indian nations, within or without the limits of states, are put upon one footing,—that asserted by the report of the committee of congress. No state has any power over them: it would be inconsistent with the power of congress.

In what light, then, must this constitution be considered as regarding the Indian nations? After the reference which has just been made, the answer is plain and unavoidable. In adopting, without exception, treaties previously made, it adopted the treaty of Hopewell, which was one of them, and immediately in view. In conferring upon the president and senate the treaty-making power, it gave to them the powers which had been exercised by congress under the same terms in the articles of confederation, including that of making treaties with the Indians. In giving to congress the power to regulate trade with the Indians, it gave to them all the power which had been exercised by congress before, freed from the embarrassment of the obscure proviso which had caused some question, and, therefore, if not enlarged, at least rendered more firm and indisputable. It plainly, purposely and unequivocally assigned to the federal jurisdiction, in its different departments, the whole subject of the Indian nations, as one which belonged exclusively to the union, and not to the states; employing for this object, in substance, the clauses in the articles of confederation which had been found efficacious before, and rejecting only such as had been the occasion of doubt or embarrassment. As to the nations themselves, it regarded them as they had been regarded before, as states, not of this union, and therefore *foreign*, and capable of making treaties with the United States. Whoever will examine the report before adverted to, will be fully satisfied that these were the views of the public men of that day, and that they were entertained upon the strongest and the soundest reasons. Occurrences of the present day give to them additional strength.

Under the constitution, the subject again received a deliberate, and peculiarly solemn examination; chiefly as to the expediency of the mode of proceeding; for the power was not questioned. In the year 1790 (August 11), President Washington sent to the senate a message in relation to the Cherokee Indians, which concluded with asking the advice of the senate upon three questions. The first of them was whether overtures should be made for arranging a *new boundary* by treaty with the Cherokees. The second related to the mode of compensating them for the land they might cede. The third was as follows, "shall the United States *stipulate solemnly* to guaranty the new boundary which may be arranged." The senate resolved to advise and consent that the president should at his discretion cause the treaty of Hopewell to be carried into execution, according to the terms thereof, or enter into arrangements for a new boundary, compensating the Cherokees for the lands they might cede. In answer to the third inquiry, the senate came to the following resolution. "Resolved, in case a new or other boundary than that stipulated by the treaty of Hopewell shall be concluded with the Cherokee Indians, that the senate do advise and consent solemnly to guaranty the same." Under this deliberate expression of the advice and consent of the senate, the treaty of Holston was made on the 2d July 1791; and was duly submitted to and approved by the senate. It is still in full force, as a treaty between the United States on the one part and the Cherokee nation of Indians on the other; with the solemn guarantee on the part of the United States which the senate had advised. Eleven treaties have since been made, the last of them in the year 1819, adopting and continuing the same guarantee. As to the state and condition of the Cherokees, they are all of them perfectly clear, and especially the treaties of 1817 and 1819.

The existence of the Cherokee nation of Indians, as a state, and a *foreign* state, is thus brought down to the present moment. The evidence of the public acts of the United States is conclusive. It is impossible to question the authority to make these treaties. The constitution plainly intended to give the power to make them. This is no constructive power, implied from doubtful clauses, or inferred from other powers

or from general words. The very case was within the view of the statesmen who framed that instrument. They adopted the provisions in the articles of confederation which had confessedly given the power, and omitted the one which had thrown a doubt upon it, for the very purpose of cutting off all dispute or question. It is not, therefore, a construction supported merely, or even principally, by a practice of forty years without question; though such a practice, concurred in by all the departments of the government, must even be deemed a venerable authority. The history of the constitution, the language of the constitution interpreted by its history, the known intention of those who framed it; fully justify the assertion, that this power could never, at any period, have been questioned, without doing flagrant violence to the known and manifest meaning of that instrument. There is not a power of the federal government more certainly conferred than this.

These, then, are treaties made in pursuance of the constitution. They are in full force. They stand in the statute book, with all the sanctions of treaties with foreign states; and *we* are in the possession and enjoyment of the benefits derived from them. Can we under these circumstances deny that which they necessarily import? Can we, consistently with any right rule of interpretation, or with the common obligations of good faith, call in question the character of the party, announced and admitted upon the face of the instrument itself, especially when by so doing we impair or take away from him the stipulated advantages of his compact. If it were morally or politically admissible, is it *judicially* possible, while the government acknowledges, as it continues to do, the existence and binding obligation of these treaties?(*a*) Can any court deny to them their natural construction?

The articles of agreement and cession between the United States and the state of Georgia, of the 24th of April 1802, are equally conclusive upon the point in question, by the concession of Georgia herself. The United States stipulate to extinguish the Indian title to lands within the state of Georgia, for the use of Georgia, "as soon as the same can be peace-

(*a*) The act of last session expressly declares in a proviso that they are not to be impaired or questioned.

ably obtained upon reasonable terms." There is an admission here that there was an Indian title; that it could only be extinguished with the consent of the Indian nation; and that the United States alone had the power to extinguish it, because the United States alone had the power to make treaties with the Indians. The act of congress of 30th of March 1802, commonly called the Indian intercourse act, speaks the same language in all its provisions. That act was made in fulfilment of the obligations of justice contracted by treaties. It was nothing more than had been solemnly guarantied. The United States were bound to make such laws, and they are bound to execute them: a failure in either would be a violation of the national faith so clearly pledged. They are bound to respect the Indian boundaries and rights themselves—they are bound to protect them from encroachments by states, or by citizens of the United States; because they have engaged to do so, and have received the equivalent for their engagement.

Judicial decisions, in accordance with this view, are not wanting. In Johnson *vs.* M'Intosh, 8 Wheat. 543, the chief justice, in delivering the opinion of this court, assumes the existence of the Indian nations as *states*, by ascribing to them powers, and capacities, and rights, which belong only to that character. In page 592, is the following passage. "Another view has been taken of this question which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws and usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, *still it is a part of their territory, and is held under them by a title dependent on their laws. The grant derives its efficacy from their will: and, if they choose to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person, who purchases lands from the Indians within their territory, incorporates himself with them, so far as respects the property purchased; holds*

their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding." Their sovereign power within their own territory; their authority to make, to administer, and to execute their own laws; to give titles and to resume them, to do, in short, what states or nations only can do; are here distinctly admitted.

In Goodell *vs.* Jackson, in the court of errors in New York, the question was discussed as to the character of the individuals composing the Indian nations. They were decided to be *aliens.* If the subjects of a state be aliens, the state itself must be an *alien state, a foreign state.*

In Holland *vs.* Pack, Peck's Reports, 151, the very question was directly presented and directly decided by the court of appeals of Tennessee in the year 1823. It was an action brought against a Cherokee innkeeper, residing in that part of the nation which lies within the limits of the state of Tennessee, for the loss of the goods of a guest. The question presented by the pleadings was, by what law the case was to be governed, the law of Tennessee or the law of the Cherokees. The court decided that the latter was to govern. In the opinion, which is full and elaborate, the whole subject is examined; and the conclusion pronounced by the court is, that the Cherokees are an independent nation, with the exclusive power of legislation within their own territory.

This point, of the national character of the Cherokee Indians, is put to rest by two of the treaties, in terms which admit neither of doubt or controversy. The treaty of the 8th July 1817 (Art. 8) makes a provision for securing certain reserves of land to those of the Cherokees *who might choose to become citizens of the United States.* This provision is referred to and adopted by the treaty of 1819, article 2. It is too obvious to require a remark, that this stipulation necessarily characterises them as *aliens,* then in a state of alienage, or of allegiance to a *foreign* state, but capable of becoming citizens of the United States at their own election, and until that election should so incline them, of remaining in the condition in which they then were. How were they to become citizens? It could only be upon the terms prescribed by the naturalization laws of the United States, of renouncing their

foreign allegiance. How could they renounce it if none such existed? It may not be amiss to add, that this provision applied to individuals and to reserves of land within the limits of states of this union. A list of them is appended to the treaty of 1819, with a description of their locality. It will be there found that the greater part of them were within the limits of the states.

This review, upon the principles heretofore adopted in judgment, would seem to be sufficient of itself for a court sitting under the constitution and laws of the United States. But wherever the inquiry may be pursued the result will be the same. The Cherokee nation is a state. It has "its affairs and interests; it deliberates and takes resolutions in common; and becomes a moral person, having an understanding and a will, peculiar to itself; and is susceptible of obligations and laws." This is the very definition of a *state*, according to the most approved writers on public law. Grotius, b. 1, c. 1, §. 14. B. 3, c. 3, §. 2. Burlamaqui, vol. 2, p. 1, c. 4, §. 9. Vattel, b. 1, c. 1. It is a *foreign* state, for it is not a state of this union. It is no part of our body politic. The Cherokees have no influence in our affairs, and no control over our conduct; and we have none in theirs, save what is given by treaty, and that is by mutual stipulation between the entire bodies politic, in their aggregate capacity, as equal contracting parties.

It is no objection to this that they are inferior or dependent allies. A state is still a state, though it may not be of the highest grade, or even though it may have surrendered some of the powers of sovereignty (Vattel, b. 1, c. 1, § 5 and 6): as a man is still a man, though mutilated and deprived of some of his limbs. Such an argument, indeed, is destitute of all colour of support, for it supposes that by entering into a treaty the very rights are given up which are reserved by the treaty. This is an absurdity.

Is there in the constitution of the United States any thing to limit or alter this natural and unavoidable construction as applied to the question of jurisdiction? In other words, is it true that though "foreign states" to other intents, they are not "foreign states" within the terms of the provision for the judiciary?

The only conceivable suggestion to the contrary, if any there be, must be derived from the third clause of the eighth section of the first article. Congress shall have power, it is there said, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The argument may be, that what are here called "Indian tribes" are specified, because they are not comprehended in the words "foreign nations;" and therefore can not be considered as embraced by the words "foreign states," in the third article of the constitution. This, it will be observed, is a mere verbal criticism, which, if allowed to prove any thing, would prove far too much. The provisions are framed for different purposes, and with different views, and are found in different parts of the constitution. The one relates to the legislature, the other to the judiciary. There is no incompatibility between them, nor is there any difficulty at all in letting them stand together, inasmuch as they do not belong to the same subject.

In what sense is the word "tribes" to be considered as here used? Its original and most appropriate meaning is a subdivision of a state, nation, or community, forming a constituent part of it, but set apart or distinguished for the more convenient management of its affairs. Thus, Rome was divided into "tribes," in the first instance three, and finally thirty-five. Athens was divided into ten tribes. There were the twelve tribes of Israel, forming together one nation, under one head, until the revolt of the ten tribes, when they became two nations, and so continued until the ten were lost. The constitution cannot have used the word in this sense. We know of no such subdivisions within the Indian nations; and if there had been, no one will suppose that the power to congress was only to deal with portions of the nations. Sometimes, it is true, this word is applied to wandering hordes, who have no territory; no fixed residence, and no organic structure. But this could not be affirmed of the Cherokee nation. They had a territory; they had fixed boundaries; they had laws and government; they were already parties to a treaty with the United States, and in that treaty were expressly denominated a "nation." Whatever might have been the habits of individuals, the nation had a local habitation, and sufficient stabi-

lity to be treated with as an organized community (*a*). Was it meant to be excluded from the power of congress? This word "tribes" will be found to occur frequently in the journals of the old congress, and especially in the report before referred to, of August 1787; where it is manifestly employed as synonymous or equivalent to "nations." If it be more comprehensive it might be used from greater caution, in order to cover the whole subject; to comprehend tribes, if any such there were, which were not nations. It would not, therefore, exclude those which were nations, but they would be embraced by both the words. So it has been construed in practice.

But if this verbal argument have any weight, we shall be obliged by it to concede that wherever it happens that different words are used, though occurring in different parts of the constitution and on different branches of power, they must necessarily mean a different thing. Then it will follow, that "foreign state" and "foreign nation" are different—that the federal judiciary has no jurisdiction in the case of a "foreign nation," and that congress has no power to regulate commerce with a "foreign state." In the tenth section of the first article, clause second (prohibiting the states from entering into alliances), the words employed are "foreign powers." This, upon the same principle, would exclude "foreign powers" from both the former articles.

The same argument would perhaps take away the treaty-making power with the Indians from the United States. A treaty cannot well be made with those who, according to the constitution, as thus understood, have no capacity to fulfil their engagements, or even to be bound by them.

It would work out a result still more repugnant to what was certainly intended. If the use of the word "tribes" in the first article excludes the application of the words "foreign states" in the third, it must equally exclude the words "foreign powers" in the section just referred to (article first, section tenth, clause second). What follows? That the states individually are not prohibited from making compacts with

(*a*) The present principal town of the Cherokee nation will be found mentioned in the earliest records of congress by the name of *Chota*.

the Indians, because they are not "foreign powers." No one, it is believed, would contend for this.

But has it ever been admitted as a sound rule of construction, justly applicable to the constitution, that a specification must necessarily restrain the general words which precede it, and can in no case be considered as merely redundant? There are repeated instances in the same section, where such a rule would be fatal to the sense. See clauses five, ten, thirteen, &c.

It is submitted, however, that the process of verbal criticism is not the correct mode of dealing with a constitution of government, where the grants of power are necessarily made in a few words. It must be interpreted in a different way. Some weight must be allowed to the general intention and design of the instrument. The judicial power of the United States was intended to be coextensive with the legislative and executive, so as to form a government complete, within the range of its powers, in all its departments, and capable of independent existence. Osbourn *vs.* Bank of the United States, 9 Wheat. 818.

The treaty-making power confessedly belongs, exclusively, to the United States. Treaties thus made are declared to be the supreme law of the land. "Cases arising under treaties" are, therefore, in express terms assigned by the article under consideration to the federal judiciary. The subject belongs to the United States tribunals, and not to the tribunals of the states. Of this, there can be no dispute. Why then suppose it to be excluded from the original jurisdiction of this court? A state of the union is a party, and it is the dignity of that party alone which entitles the case from its beginning to the attention of the highest tribunal. The character of the other party is in this respect of no importance. What reason can be assigned for an exclusion so contradictory? Why should the constitution which says expressly that, in all cases where a state is a party, the supreme court shall have original jurisdiction, be made to say by implication, that in this case, where a state is a party, it shall not have original jurisdiction? To what jurisdiction would they be referred. The same argument which took away the alien character of the nation would equally destroy the alien character of the individuals composing it. They certainly are

not citizens; and if they be not aliens, what are they? Outlaws. Declared outlaws, without a nation, and without protection. Public law abhors such a state of existence. It is not more essential in municipal arrangements that every thing capable of ownership should have a legal and determinate owner, than it is in the great society of nations that every man should be bound by some allegiance, should be a member of some community. The Cherokee Indians are willing to be so. They are so. They are more so now than they were at any former period. Guided by our counsels, aided by our efforts (for which we have taken much credit with the world) they have become civilized and enlightened, and attached to the acts of civilized life; and are consolidating their advantages under a form of government instituted at the suggestion of one of our most eminent statesmen.(*a*) The preservation

(*a*) The following is the speech addressed to them by Mr Jefferson.

My Children, Deputies of the Cherokee Upper Towns.

I have maturely considered the speeches you have delivered me, and will now give you answers to the several matters they contain.

You inform me of your anxious desires to engage in the industrious pursuits of agriculture and civilized life; that finding it impracticable to induce the nation at large to join in this, you wish a line of separation to be established between the Upper and Lower Towns, so as to include all the waters of the Highwassee in your part; and that having thus contracted your society within narrower limits, you propose, within these, to begin the establishment of fixed laws and of regular government. You say, that the Lower Towns are satisfied with the division you propose, and on these several matters you ask my advice and aid.

With respect to the line of division between yourselves and the Lower Towns, it must rest on the joint consent of both parties. The one you propose appears moderate, reasonable and well defined; we are willing to recognize those on each side of that line as distinct societies, and if our aid shall be necessary to mark it more plainly than nature has done, you shall have it. I think with you that on this reduced scale, it will be more easy for you to introduce the regular administration of laws.

In proceeding to the establishment of laws, you wish to adopt them from ours, and such only for the present as suit your present condition; chiefly indeed, those for the punishment of crimes and the protection of property. But who is to determine which of our laws suit your condition, and shall be in force with you? All of you being equally free, no one has a right to say what shall be law for the others. Our way is to put these questions to the vote, and to consider that as law for which the majority votes—the fool has as great a right to express his opinion by vote as the wise, because he is equally free, and equally master of himself. But as it would be inconvenient for all your men to meet in one place, would it not be better for every town to do as we do: that is to say, choose by the vote of the majority of the town and of the country people nearer to tha.

of their character as a state was essential to their happiness and even to their existence; it was essential, too, to enable them to fulfil many of their treaty obligations towards the United States.

In conclusion, upon this point, Mr Sergeant remarked that he would not be understood to question the power of the United States over the whole matter. He would not undertake to say what congress might do. But until the power was plainly exercised, to the extent of abrogating the treaties, upon the responsibility which belonged to such a step; those treaties would continue to be the law, and must be respected and executed as such.

2. That a sufficient "case" or "controversy" was presented to call for the exercise of the judicial power.

What constituted such a case? "A case in law or equity" is a term well understood, and of limited signification. It is "a controversy between parties which has taken a shape for judi-

than to any other town, one, two, three or more, according to the size of the town, of those whom each voter thinks the wisest and honestest men of their place, and let these meet together and agree which of our laws suit them. But these men know nothing of our laws. How then can they know which to adopt? Let them associate in their council our beloved man living with them, Colonel Meigs, and he will tell them what our law is on any point they desire. He will inform them also of our methods of doing business in our councils, so as to preserve order, and to obtain the vote of every member fairly. This council can make a law for giving to every head of a family a separate parcel of land, which, when he has built upon and improved, it shall belong to him and his descendants for ever, and which the nation itself shall have no right to sell from under his feet. They will determine too, what punishment shall be inflicted for every crime. In our states generally, we punish murder only by death, and all other crimes by solitary confinement in a prison.

But when you shall have adopted laws, who are to execute them? Perhaps it may be best to permit every town and the settlers in its neighbourhood attached to it, to select some of their best men, by a majority of its voters, to be judges in all differences, and to execute the law according to their own judgment. Your council of representatives will decide on this, or such other mode as may best suit you. I suggest these things, my children, for the consideration of the Upper Towns of your nation, to be decided on as they think best, and I sincerely wish you may succeed in your laudable endeavours to save the remains of your nation, by adopting industrious occupations and a government of regular laws. In this you may rely on the counsel and assistance of the government of the United States. Deliver these words to your people in my name, and assure them of my friendship.

THOMAS JEFFERSON.

January 9, 1809.

cial decision." (Speech of Chief Justice Marshall in the matter of Nash *alias* Robins, note to Bee, 277.) It is defined also in 9 Wheat. 819. "This clause" (1st clause, 2d sect. 3d art. Constitution United States) "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting upon it. That power is capable of acting only when the subject is submittted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States."

To make such a *case* a *controversy*, there must be, 1. Parties capable of suing and being sued. 2. A subject matter proper for judicial decision.

1. It could not be questioned that *here* were such *parties.* They were within the very words of the constitution. That clause admitted at the same time, that there might be subjects of judicial controversy between such parties; there is, therefore, no presumption from their character against the jurisdiction. It might be, that a question between the United States and a foreign state, arising upon a treaty, could not be a case of judicial cognizance; that it would necessarily be political or diplomatic, and not judicial. But a question with a state could not be of that description, because a state could have no political or diplomatic relations. Const. Art. 1, Sect. 10. It was no more diplomatic than if it were the case of an individual complainant. The questions might be precisely the same. Its being the case of a *state*, defendant, could make no difference, for this court entertained jurisdiction in equity of controversies between states, as in the pending case between New Jersey and New York. As to the parties, there could be no doubt.

2. Was there a subject matter, proper for judicial decision? That must depend upon the nature of the *right* which was asserted, and the nature of the *wrong* which was inflicted or meditated. As to the *rights* of the complainants, as they were here asserted, they might be considered for the present purpose as founded entirely upon the laws of the United

States; that is, upon treaties and upon acts of congress, which were of equal authority. These rights were judicially known to the court as part and parcel of the laws of the United States. It was not necessary to go out of those laws for the purpose of investigating them. They were not obliged now to explore the original grounds of right, nor to question the European principle of discovery. Such as they appeared upon the statute book the complainants were willing to consider them; and they asked nothing more than to have them enforced as they there appeared.

Of these rights the Cherokees were in the actual possession; with the knowledge and acquiescence of all the authorities of the United States. There was no dispute between them. Their claim was only to be protected from disturbance or interference with their established rights; and they claimed it against those who were subject to the authority of the laws of the United States and within their jurisdiction, but did not profess to derive any sanction for their conduct from the United States.

These rights, it was further to be remarked, were such, that in a suit between the citizens of the United States, they would undoubtedly be within the jurisdiction of the laws of the United States. What were they? The treaty of July 1817 (art. 5) continued in force all former treaties. The treaty of February 1819 was only a final adjustment of the former. All the guarantees of former treaties are therefore in full force.

1. The first of the rights admitted, and professed to be guarantied and secured to them, was the right, *within their own boundary*, of self government. Their political power is abridged by their own concessions, and so is their right of property by conditions annexed to it. But the right to regulate their own *civil* condition within their own limits, to make and to execute their own laws, is exclusive and absolute. It is extended expressly by treaty, as well as by the intercourse act, to persons going amongst them. This is the plain import of all the treaties, as well as of the intercourse act. In the treaties, means are employed for civilizing them, but they are proposed in the way of advice and assistance, and not in the way of authority or command. See particularly Art. 14,

treaty of 1791; Art. 2, treaty of 1806; preamble of treaty of 1817, and Art. 8 of same.

2. The next was the right of property, modified, but still exclusive and absolute against all interference. The *mode* of enjoying it was left to themselves. Whatever it might be, it resolved itself into individual enjoyment as to its end and purpose. As against the United States and their citizens, this right was sacred and incontestable. It was acknowledged in every variety of way. The boundaries were fixed by treaty, and what was within them was acknowledged to be the land of the Cherokees. This was the scope of all the treaties. Treaty of Hopewell, Art. 4. Treaty of Holston, Art. 7, &c. The United States would not even assume the right of passage without their consent, and when it was granted, it was by treaty in a limited way, by a particular road. Treaty of Holston, Art. 5. Treaty of 1795, Art. 7. They stipulate against intrusions, abandoning intruders to the laws and tribunals of the Cherokees. Treaty of Hopewell, Art. 5. Treaty of Holston, Art. 8. They stipulate also for protection. Treaty of 1798. Art. 4.

It was unnecessary for this purpose to go more fully into those treaties. They spoke one language throughout, and that was, that the Cherokees were entitled to the occupation and enjoyment of their land without intrusion or interference. The same language was spoken by the intercourse act. Indeed, he might add, that as yet, it was not disputed by any act or declaration of the United States through any official organ authorised to do or to speak on the subject. These rights were absolutely unquestioned, and the obligation to protect them was in full force. The United States had never by any competent authority disclaimed it. They do not disclaim it now. The solemn guarantee advised by the senate in 1790, and given by the executive, with the advice of the senate, in the year 1791, is as fresh in its claim upon the public faith as the day when the treaty was signed. It is true that the stipulated protection is not afforded; but the congress of the United States have never denied the right to claim, or the obligation to afford it.

3. What are the wrongs they complain of?

The violation of these *rights*, to the extent of their total

destruction and *extinction.* The legislation of Georgia proposes to annihilate them, as its very end and aim; the acts already done under it are in furtherance of that purpose, and those which are further menaced will be its consummation. The laws of Georgia profess no other object; they are effectually conceived for this. If those laws be fully executed, there will be no Cherokee boundary, no Cherokee nation, no Cherokee lands, no Cherokee treaties, no laws of the United States in the case. They will all be swept out of existence together, leaving nothing but the monuments in our history of the enormous injustice that has been practised towards a friendly nation.

These laws of Georgia operate upon the individual Cherokees as well as upon the nation. They are virtually made outlaws, neither citizens nor aliens, nor competent to be witnesses in courts of justice. They operate also upon their property, and upon the rights and privileges declared for them by the laws of the United States.

Is not this, then, a *case* or controversy of *judicial* cognizance? The bill sets forth a number of individual instances of the exercise of the unjust authority. Would they not, upon the complaint of individuals, be the subject of judicial cognizance? Would not the questions to be presented, discussed, and decided, be precisely the same as they now are? As questions of property, as personal privileges, or as corporate privileges, they are matters of judgment purely and strictly, without any admixture whatever of political or diplomatic considerations, and they have become a *case*, or subject of a suit, by the actual perpetration of injury and the menace of its repetition. They are questions upon the laws of the United States, in suits against citizens of the United States; and if it be necessary still further to examine the ground of complaint, it will be found that it is one of every day judicial cognizance, namely, that the laws of Georgia are unconstitutional and void.

Is not the character of the aggregate the same as that of the particulars of which it is composed? Is there any thing in the process of aggregation to alter it? The constitution of the United States gives no colour to such a distinction. It applies the same description of case or controversy to bodies

and to individuals. Judicial decisions give it no countenance, but the contrary. Jurisdiction is entertained of suits between states, as in the instance now pending. In the case between states there must always be individual interests involved with those of the state. Jurisdiction is entertained of suits by corporate bodies. Osburne *vs.* Bank of the United States, 9 Wheaton, 733.

To what forum (of those belonging to the United States) the resort is to be had, depends upon the parties. The federal jurisdiction depends upon the nature of the case or question. If that be such, that it might be here by an individual, under the twenty-fifth section of the judiciary act, by appeal; it may be brought here originally by a state.

It might be that, in fact, the present was the only mode in which the protection of the United States judiciary could be obtained, or in which it could be called upon to vindicate the majesty of the laws and treaties. The nature of the Cherokee institutions and polity, as to the tenure of land, presented a difficulty on the one side. The determination of the authorities and tribunals of the state of Georgia not to permit a suit to reach a stage where a writ of error could be made available, was at present an insuperable difficulty on the other. If redress could not be afforded in the mode now proposed, they might all, like Tassels, suffer final and irreparable infliction while waiting for the time of hearing before this court.

The complainants, then, come here upon the ground of the violation of a legal right, and *that*, he submitted, was a case or controversy. They do not present an abstract question. They do not present a political question. They do not come to demand in general terms the fulfilment of a treaty, nor to ask this court to enforce the execution of an active article. They do not come to claim any thing adversely to the United States, nor to ask this court to settle questions between the high contracting parties. They ask for redress and protection against wrongdoers in the accustomed legal way, and they vouch the treaties as the evidence of their rights.

4. Is such a case presented by the bill as entitles the complainants to the specific remedy of injunction. For the purpose of this inquiry, in its present stage, all the averments of the bill are to be taken to be true.

[The Cherokee Nation *vs.* The State of Georgia.]

An injunction is the process of equity to restrain, where restraint is necessary, to prevent irreparable mischief; for which there is no adequate redress at law. Eden on Injunctions, 1, 209. It is granted to hold a fund, until a decision can be had of a claim upon it. State of Georgia *vs.* Brailsford, 2 Dallas, 402.

In this court there is a decision directly applicable. An injunction may be issued to restrain a person who is an officer of a state from performing an act enjoined by an unconstitutional law of the state. Osburne *vs.* Bank of the United States, 9 Wheaton, 733. Mr Sergeant referred particularly to the argument of counsel, 748, and the opinion of the court by the chief justice, 838, 9. This case, in the argument and decision, was full to the present purpose, and was an adequate and sufficient authority for the injunction in the present case. The subject of complaint was the same—an unconstitutional law. The object was the same—to restrain its execution. The state of things, calling for relief, was the same, except that here the threatened danger was far greater and more urgent. Here, as there, the property, the franchises, rights and privileges of the complainants were menaced.

Perhaps it might be suggested that the complaint related to matters out of the United States, but within the Indian nation, and therefore beyond the limits of the jurisdiction of the court. It was not necessary to examine very particularly the foundation in fact of such a suggestion. Among the acts stated, however, it would be remarked, was that of drawing the complainants to tribunals within the United States, to which they were not amenable. But, independently of this, there was a very satisfactory answer. A court of equity does not regard the situation of the subject matter in dispute, but considers only the equities arising from the parties. It has enjoined a party from proceeding in a foreign court. Eden, 101, 2, 3. Wharton *vs.* May, 5 Ves. 27. Upon the same point there is a clear authority in this court. In Massie *vs.* Watts, 6 Cranch, 148, it was decided, that a court of equity has jurisdiction, *in personam*, in cases involving trust, contract, or fraud, wherever the person of the defendant is even casually to be found within its jurisdiction; although it may be unable to enforce its decree in rem, the property

in controversy being out of its jurisdiction. This was a case involving contract.

He deemed it unnecessary to trouble the court further upon this point.

Mr Wirt spoke to the following effect:

The complainants and their counsel are fully aware of the delicacy of this question. They feel all the difficulties and embarrassments, judicial and political, which surround it. They have thought it their duty, therefore, to weigh the measure well, in all its aspects, in advance. They have not come hither rashly and unadvisedly. The complainants have not been permitted to proceed on the opinion of any single individual of the profession. They have been required to consult, and they have accordingly consulted, several of the most enlightened and eminent jurists of this country, residing in different and distant parts of the continent; and it was not until the perfect concurrence of them all had been ascertained, on all the points involved in this motion, that the resolution was taken to bring it before the court. These jurists unite in the opinion that the laws of Georgia, here in question, are unconstitutional, as being repugnant to the constitution, laws, and treaties of the United States; that this court has perfect jurisdiction on the subject, and may award the injunction which is prayed; and that in the exercise of this jurisdiction they stand, of right and duty, free of all control or influence from any other department of the government. With such a unanimity of opinion, no other course of duty remained for us but to bring this subject before the court. The fact of this previous consultation is mentioned with no weak expectation that it will influence the decision of this court. We know too well the character of this tribunal, to entertain any such vain and idle expectation. We mention it to acquit ourselves of all rashness and inconsiderateness in taking this step: to satisfy your honours that we know too well what is due to our country and to this high tribunal, to have been guilty of the levity and folly of acting on this solemn subject as on a professional matter of every day's occurrence. Even after all this precaution; all this previous deliberation and consultation, we approach the subject with

great anxiety; for we perceive, and it would be a vain attempt to disguise it, the delicate and painful situation in which the motion cannot fail to place this honourable court.

We say nothing of our own responsibility on the occasion. This we are content to bear. But for the sake of the court, if we could have perceived any other course of moral or professional conduct that remained for us, than to do our duty and to leave the issue to Providence, we should not have troubled your honours with this motion. It is best, however, that the question should be decided and put to rest; for so long as the complainants shall be instructed that they have relief here, they cannot rest contented until the experiment shall be made. If your honours believe that you can give them relief and shall give it, we have a firm belief that you will be sustained by the moral power of the American community, and that all doubt and resistance will disappear. If, on the other hand, you shall decide that you have not the jurisdiction which we claim; however much we must regret it, we shall bow with respect to your decision, and the complainants will learn that they must look to some other quarter for the redress of their grievances; though to what other quarter on this earth they can look, with any shadow of hope, God only knows. They have not come to you, in the first instance, with their complaints. They have tried the quarter from which relief was most naturally to have been expected; the quarter to which their past experience had taught them to look with confidence, and to which they have never looked in vain until within the last two years. They have tried that quarter, and they have failed. They have come to you now; because without your aid they have found, as they allege in their bill, that they are wholly remediless.

May it please your honours, this ancient people, the Cherokee nation, a nation far more ancient than ourselves, and, in all probability far more ancient than the mixed Saxon and Norman race that people the land of our fathers, present themselves to you as a separate, sovereign state. They complain that a state of this union has invaded their rights of person and of property, by a species of legislative warfare, in violation of the treaties, the constitution, and the laws of the United States.

They ask a *subpœna* against this state, to call her to judgment before you. They ask an injunction, *pendente lite*, to restrain her from executing her unconstitutional laws within the Cherokee territory: and if, on the final hearing, you shall adjudge those laws to be unconstitutional, they ask a *perpetual injunction* to quiet them in the possession and enjoyment of their treaty rights.

Does the judicial power of the United States extend to this subject?

The constitution declares that "the judicial power *shall* extend to *all cases* in *law* and *equity arising under this constitution, the laws of the United States*, and *treaties made, or which shall be made, under their authority.*"

Thus the judicial power of the United States covers the whole field of action of the federal government: not to interfere with the operations of other departments, but to settle *all cases in law and equity* arising out of those operations. The policy of the constitution is manifest. It was to give to the federal government all the powers necessary to its own independent action, and the continuance of its existence; so that it might move, of itself, throughout the whole of its own appropriate sphere, and execute all the objects entrusted to it, by its own energies, instead of having its movements impeded or delayed by being made dependent on the judicial cooperation of any other system. Now this cooperation might be refused. It was foreseen that jealousies might arise, as they have arisen, and that the success of this great political experiment might be frustrated by the refusal of the states to lend their assistance to its measures. There were other reasons for this grant of judicial power coextensive with the whole field of federal action. The federal government is the government of the whole nation, united as one nation, for the attainment of great public ends. Among these ends is the maintenance of peace with foreign nations; hence the whole intercourse with foreign nations is taken from the states and confided to the federal government. But it would be in vain that the constitution has spoken, that congress has the power of making laws, and the president and senate the power of making treaties to regulate this intercourse; unless there was a coordinate judiciary of coextensive power, to give a uniform construction

to these laws and treaties by the determination of *all questions in law and equity arising under them.* This uniformity of construction could be secured in no other way than by confiding the ultimate decision to the supreme court of the nation. It is but a shallow question to ask whether the courts of the states could not be trusted with these questions? The negative answer to it implies no reflection either on the learning or patriotism of the state courts. Courts equally learned and patriotic are continually differing in opinion on the same questions. We see it every day. And the consequence of referring these questions to the courts of the states would naturally be, that we should have as many different opinions on the constitution, treaties, and laws of the United States as there are states in the union, and all those with equal claims to learning and patriotism. How should we stand with foreign nations under such a judicial administration of our laws and treaties, involving the rights of their citizens and subjects. It is manifest that the federal government would be perpetually involved in foreign broils, against which it had no means of guarding. The only safe and efficient depository of the judicial power of the United States is, therefore, that which the constitution has ordained;—the courts of the union, acting under the supervision and correction of the supreme court of the United States. These principles are familiar here, and require only to be understood to be approved every where.

But although the constitution has declared that the judicial power of the United States *shall* extend to all cases in law and equity arising under the constitution, laws, and treaties of the United States; it has been said, that it remained for *congress so to extend it by express legislation,* and that *congress* has not communicated to the courts all the power which the constitution authorised that body to communicate.

This is true with regard to those courts which congress had the power to ordain and appoint, and to clothe with jurisdiction. The constitution declares that "the judicial power of the United States *shall be vested in one supreme court, and in such inferior courts as the congress may from time to time advise and appoint.*" Congress has ordained and appointed such *inferior* courts, called circuit and district courts; and has vested these courts with certain portions of the judicial power

of the United States. With regard to these courts, they can exercise no other portion of this power than that which congress has thought proper to vest in them. But the supreme court is on a different footing. For it was created, not by congress, but by the constitution itself. The supreme court of the United States is therefore a *constitutional court.* It was called into being, not by congress, but by the constitution; and it takes its original jurisdiction from that instrument, and not from any grant of congress. Congress has no power either to enlarge or to diminish its jurisdiction. Such has been the decision of this court(*a*).

This jurisdiction extends *to all cases, in law and equity, arising under the constitution, laws and treaties of the United States.* It has no other limit, than that which arises from *the character of the parties.* The constitution declares that in all cases in which *a state* shall be a party, the supreme court shall have *original* jurisdiction: and the same instrument, as narrowed by the eleventh amendment, still declares that *a state* may be a party when called before the supreme court by *another state* or by *a foreign state.*

Here a state is a party, the state of Georgia. There is a proper *defendant,* therefore, to form the original jurisdiction of this court. This defendant, it is true, has not been called before this court by any other *state of the union:* but it has been called here by the Cherokee nation; which, though not a state of the union, is, in the sense of the constitution, *a foreign state;* since those who compose it owe no allegiance to the United States, nor to any state of the union, nor to any other foreign prince, potentate or state, but to their own constitution and laws only; and since, they have been constantly recognized, and by the numerous treaties now in force still stand recognized as a foreign state by the government of the United States. This, however, we are sensible is the very knot of the controversy, and it requires to be more deliberately and carefully untied. Let us resolve the question into its elements, and inquire,

1. Whether the Cherokee nation be *a state?*

(*a*) Marbury *vs.* Madison, 1 Cranch, 137, 1 Peters's Condens. Rep. 267. Cohens *vs.* Virginia, 6 Wheaton, 399. Osburn *vs.* United States, 9 Wheaton, 820

2. Whether it be a *foreign state* in the sense of the constitution.

1. Is it a state? What is a state? Vattel says, "*nations* or *states* are bodies politic, societies of men united together to procure their natural safety and advantage by means of their union."

"Such a society," he continues, "has its affairs and interests, it deliberates and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws." Preliminary remarks, sect. 1 and 2.

Again, he says, "*a nation* or *a state* is, as has been said at the beginning of this work, a body politic or a society of men united together, to promote their mutual safety and advantage by means of their union.

"From the very design that induces a number of men to form a society that has its common interests, and ought to act in concert, it is necessary that there should be established *a public authority* to order and direct what ought to be done by each in relation to the end of the association. *This political authority is the sovereignty*, and he or they who are invested with it are *the sovereign*.

"It is evident from the very act of the civil or political association, that each citizen subjects himself to the authority of the entire body in every thing that relates to the common welfare. The authority of all or each member, therefore, essentially belongs to the body politic or to the state; but the exercise of that authority may be placed in different hands, according as the society shall ordain." Vattel, B. 1, c. 1, s. 1 and 2.

Carry this definition to the Cherokee nation. Is it not *a body politic or society of men united together to promote their mutual safety and advantage by means of their union? Has it not common interests; does it not act in concert; is there not a public authority established among them, to order and direct what ought to be done by each in relation to the end of the association?* On this motion, the allegations of the bill, supported as it is by the usual affidavits and vouchers, must be taken as true. And the bill affirms (a fact, indeed, which we all know to be true) that the Cherokee

nation has a constitution framed on the model of our own; that the political society is divided, like ours, into three separate departments, legislative, judicial and executive; that laws are made, expounded, administered and enforced, as among ourselves; that there is *a public authority established among them, to consult and provide for the common interests* and *to order and direct what ought to be done by each in relation to the end of the association, the common good of the whole.* It meets Vattel's definition of a state, then, at any point, as well as the definition of any other writer who has written on the law of nations. According to all these writers, it is a sovereign state, and belongs to the common family of sovereign nations. Grotius, B. 1, c. 1, § 14. 2 Burlemaqui, Part 1, ch. iv. § 9. Martens, B. 1, c. 1, § 1.

It is the right of self-government which is the test of sovereignty. "Every nation that governs itself," says Vattel, "in what form soever, without any dependence on foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society under the law of nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient if it be really sovereign and independent; *that is, it must govern itself by its own authority and laws.*" Id. ib. § 4. By this authority the Cherokee nation is a sovereign state, *a natural society under the law of nations:* since its right to govern itself according to its own pleasure has never been disputed, until this pretension which has been recently set up by the state of Georgia; and the rectitude of which is here in question.

It is true that the Cherokee nation has, by its own voluntary treaties, placed itself *under the protection of the United States;* has stipulated that the United States may regulate its trade, not among the members of its own community, but with the white inhabitants around them; and it has farther contracted that it will not treat with any other state or foreign state. *Do these stipulations destroy its political character as a sovereign state?*

Vattel says, "we ought, therefore, to reckon in the number of those sovereigns, those states that have bound themselves to another more powerful, by an *unequal alliance,* in

which, as Aristotle says, to the more powerful is given more power, and to the weaker more assistance.

"The conditions of these unequal alliances may be *infinitely varied.* But *whatever they are, provided the inferior ally receives to itself the sovereignty, or the right of governing its own body, it ought to be considered as an independent state,* that keeps up correspondence with others under the authority of the law of nations.

"Consequently, a weak state that, in order to provide for its safety, *places itself under the protection of a more powerful one,* and, from gratitude, enters into engagements to perform several offices equivalent to that protection, without in the least stripping itself of *the right of government and sovereignty;* that state, I say, does not cease, on this account, to be placed among the sovereigns who acknowledge no other law than that of nations." Id. ib. s. 5 and 6. Martens, b. 1, c. § 1.

Let it be borne in mind, that the precise question now before us is, whether the Cherokee nation be *a state,* or whether it has ceased to be such on account of the treaty stipulations to which I have just adverted. Let us see how far the same stipulations have been considered as producing this annihilating effect on other states.

Each state of this union has placed itself under the protection of the United States; it has stipulated that the United States shall regulate its trade and intercourse not only with the other states but with foreign nations; it has stipulated farther, that it will not enter into any treaty, alliance, or confederation, nor into any agreement or compact with another state, or with a foreign power, without the consent of congress. Stipulations of a like kind are supposed to have destroyed the political existence of the Cherokee state, *as a state:* have they destroyed the political existence of the several states of the union *as states,* or even as *sovereign states?* Nay, the states of this union have gone much farther. They have formed themselves into a confederacy under the name of the United States. They have instituted a government of the United States, with power to legislate on a variety of subjects over the states; to lay imposts on their trade and direct taxes on their property; to make war and peace for them; to coin

money for them; to borrow money on their credit; to institute courts among them; to declare war, and make peace for them; and on all the subjects on which the federal goverment are authorized to act, they have declared that the power of the latter shall be supreme, any thing in the constitution or laws of any state to the contrary notwithstanding. Have these large grants of power to the federal government *destroyed* the political existence of the states *as states?* Has it destroyed their *separate sovereignty?* It has *so far impaired* it; but has it *destroyed* it? Has it destroyed the right of self government within themselves? Has it authorised any other state to consider them as degraded by these concessions of power from the rank and character of states, and to interfere, on this ground, with their own right of self government? Have they ceased to be *sovereign* and *independent* states? Surely not. "In short," says Vattel, "several sovereign and independent states may unite themselves together by a perpetual confederacy, without each in particular ceasing to be a perfect *state. They all form together a federal republic;* the deliberations in common will offer no violence to the sovereignty of each member, *though they may, in certain respects, put some constraint on the exercise of it, in virtue of voluntary engagements.* A person does not cease to be free and independent when he is obliged to fulfil the engagements into which he has *very unwillingly* entered. Vattel, B. 1, c. 1, § 10.

Thus we see that the several states of this union, although they have entered into a confederacy by which they have resigned to the United States several of their attributes of sovereignty, have not still relinquished their political existence *as states*, but are, still, *not only states*, but *sovereign and independent states*; sovereign in every thing but in the particulars in which they have voluntarily *imposed a restraint on themselves*, in consideration of the greater benefits which they derive from the union.

Vattel distinguishes between these *voluntary engagements* and *conditions forced upon a state by right of conquest.* In the case of conquest the victor dictates the terms on which he will accept the submission of the vanquished. He incorporates them with the rest of his subjects, and governs them

by the same laws: or he permits them still to retain their lands and to use their own laws *during his pleasure.* But by force of the conquest they are *his* subjects, their country is *his*, and they are but *his tenants at will*, both of their lands and their laws: he may resume the former and displace the latter at pleasure, without any imputation of injustice. Having, therefore, fallen under foreign dominion by right of conquest, they have lost the character of states. Such are the different effects on the political character of a state between *engagements voluntarily assumed*, and *obligations forced upon them by right of conquest.*

Let us bring these principles to the case of the Cherokee nation. The bill affirms that they were never *conquered;* and this allegation must be taken to be true, unless there be some historical fact known to the court which disproves it. But there is no such fact. They never were conquered, in the political sense of this term, either by Great Britain, by the states, or by the United States. They have had wars with these powers; have been, perhaps, sometimes worsted in battle, and at others victorious. But as a nation they never bowed their necks to the yoke of a conqueror. These wars have been terminated by treaties, and these treaties themselves furnish the evidence that this nation has never been conquered. The conqueror does not treat with the conquered on the footing of equality. He dictates the terms on which he will receive their submission. He has over them the power of life and death; and he tells them on what terms he will permit them to live. He does not ask their assent; he exacts their obedience. They are at his feet in the posture of submission; and he strikes off their heads, or bids them live his subjects and obey implicitly, on every occasion, his high behests. But look at the treaties between the United States and the Cherokee nation. Are they marked with the characters of conquest? On the contrary are they not marked with all the characters which we know to be historically true of the transactions of nations equally tired of war and equally willing to arrange the terms of peace, in the admitted capacity of sovereigns.

In the war of our revolution, the Cherokees, in common with other Indian nations, had joined the British arms, and we had found them formidable enemies. We all know

the state of exhaustion in which we came out of that war. We were then far more anxious for peace than these Indian nations. They continued the war even after their British allies had made peace. They were fierce and powerful tribes, concentrated, in great force, on our then weak frontier, and the first overtures for peace came from us. It was not until 1785 that the tomahawk was buried by the treaty of Hopewell.

Is that treaty marked with the *traits* of conquest? Let its *stipulations* be candidly examined. I do not speak of single phrases as they have been rendered into English, and from which no candid construction can be drawn against the Indian nations who did not understand our language, and could be expected to look only to the *substance of the stipulations*. For example, we had repeatedly asked peace of the Indians. The proposition came from us. They at length agreed to make peace with us; and this agreement our commissioners thought proper to express thus: "the commissioners plenipotentiary of the United States in congress assembled *give peace* to all the Cherokees, and *receive them into the favour and protection of the United States of America, on the following conditions.*" And from this phraseology an inference may be drawn that they were a conquered people suing for peace. But is this a fair mode of considering the subject? Look at the intellectual condition of the people with whom we were treating. "The head men and warriors of all the Cherokees," who were the negotiators on the other side, and who were negotiating in arms; did not understand our language at all, and could negotiate only through interpreters. The *thing* interpreted to them could have been no other than that there was to be peace by mutual consent, and that they were now to assume the same relation towards the United States, which they had theretofore held with the antecedent government of Great Britain; a relation which had never been that of a conquered people, but had always been expressed by the terms of "friends and allies." So in the fourth article of that treaty, the language in which our commissioners rendered the treaty is: "The boundary *allotted* to the Cherokees for their *hunting* grounds, between the said Indians and the citizens of the United States, &c." and this has been thought to justify the inference that

the Cherokees hereby admitted the territory to belong to the United States, and that they were thenceforth to hold it by the *permission* or *allotment* of the United States, and this merely for the purpose of hunting upon it. But this is another unfair verbal criticism, much against a people who did not understand our language, and who could not have been supposed, and cannot now be supposed to have understood any thing more by the article, than that the boundary there described was thenceforth to be the boundary between them and the citizens of the United States. This was the substantial purpose of the article which alone they could be supposed to have understood or intended. They were willing there should be peace, and that a boundary should be drawn between them and the white people. There is nothing in the *substance of either of these stipulations* which implies a conquest: and to draw such an inference from the idiomatic turns of expression in a language, to which they were entire strangers would be unworthy of the dignity and honour, the justice and candour of the United States. It is to the substance of these stipulations alone that a tribunal like this will look, in interpreting a treaty with a people thus circumstanced. Let us adopt this rule of candour, and let us look to the *substance* of the other articles of this same treaty, with a view to the question now before us, whether the Cherokee nation were thereby surrendering their political existence as a nation.

The first and second articles stipulate *mutual restoration of prisoners,* in the language of equal sovereigns terminating a war by a treaty of peace. Is it possible to reconcile this stipulation with the idea of a people subjugated by conquest, who are no longer to have a country of their own, nor a separate political existence? Their prisoners were to be *restored to them.* But of what avail such restoration, if they were no longer a separate people.

The fifth article surrenders intrusive white settlers within the Cherokee boundary, to the jurisdiction and punishment of the Indians, *at their discretion.* Can this be reconciled with the idea of the political annihilation of these people by conquest?

The sixth article contains a stipulation on the part of the Cherokees, to deliver up all criminals, fugitives from justice,

who shall have committed offences *on any citizen of the United States*, and shall have *taken refuge in their nation.* Does this look like an extinction of their national existence?

But the eighth article is decisive of this question. It is a mutual stipulation by the contracting parties that *retaliation* shall not be practised on either side, "*except there is a manifest violation of this treaty;* and *then it shall be preceded first by a demand of justice, and, if refused, then by a declaration of hostilities.*"

By what process of human reason is it possible to reconcile this admitted equality of right to *retaliate* and *make war on the United States* with the idea of the abolition of the Cherokees as a nation? The court will observe that it is not a right professed to be *conferred* by the treaty. It is dealt with as a *pre-existing, inherent* right, precisely the same right which the United States themselves possessed to retaliate and make war upon the Cherokees: and the sole object of the article is to *regulate* this admitted right, and to *regulate it equally, and by the same rule, on both sides.* Did a conqueror ever enter into such a treaty with those whom he had subjugated and reduced to the condition of subjects? War by a people in that condition would be *treason*, not *lawful war. Sovereign nations* alone have a *right* to make war. The article recognizes one of the established rights of nations, as it is known in the law of nations, and seeks to regulate it, as in modern times it is regulated, by the mild and peaceable spirit of that code. "*A sovereign,*" says Vattel (b. 11, c. 16, § 336), "ought to show in all his quarrels a sincere desire of rendering justice and preserving peace. He is obliged, therefore, before he takes up arms, and after having taken them up also, to offer equitable conditions, and then alone his arms become just against an obstinate enemy, who refuses to listen to justice or equity." Again (ib. § 338), "if the subject of the dispute be an injury received, the offended ought to follow the rules we have established. His own advantage, and that of human society, oblige him to attempt, before he takes up arms, all the pacific modes of obtaining either the reparation of the injury, or a just satisfaction; at least, if he has not good reason to dispense with it." And again (ib. § 339), "when *a nation* cannot obtain justice, either for a loss or an injury, it has a

right to do itself justice. But before it *declares war*, there are various methods practised *among nations*, which remain to be treated of here. We have placed in the number of these methods of obtaining satisfaction, what is called the law of *retaliation*, according to which we make another suffer exactly so much evil as he has done," &c. &c. If this right alone had been the only one recognised as a continuing right in the Cherokee nation, it would have presented a clear and unanswerable refutation of the idea that *this nation* had been extinguished as a nation, by conquest. There is no more decisive badge of sovereignty than the right of making war in a national capacity. Those, who are parties to a legitimate public war, can be *nations* and *sovereigns only* in their political character of *nations* and *sovereigns*. The very definition of a *public war* involves, of necessity, this idea. "War (says Vattel, b. 1, c. 1, § 1) is that state in which *a nation* prosecutes its rights by force." Again (§ 2), "*public* war is that betwixt *nations* or *sovereigns*, and carried on in the name of *the public power*, and *by its order*." Since, then, nations and sovereigns only, in their political capacity, can wage a legitimate war, the admission here made, by this article, that the Cherokees may rightfully wage such a war against the United States, is a conclusive admission of their continuing political existence *as a nation;* an admission made by the United States themselves, in a public treaty, which treaty composes a part of that supreme law of the land which is to be administered in this hall.

This treaty of Hopewell, it is to be observed, is a treaty of peace; and was negotiated immediately at the close of the war, and probably on or near the field of battle. Some of the witnesses to it appear to have been officers in the military force of the United States engaged in that war. The commissioners on the part of the United States were Benjamin Hawkins, afterwards the Indian agent in that quarter, Andrew Pickens, Joseph Martin and Lachlan M'Intosh, American officers. The ninth and tenth articles of the treaty prove that they were acting upon a sudden emergency and according to their own judgment, without any specific instructions from congress. The ninth article may demand some further notice: it is in these words.

"For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and of managing all their affairs in such manner as they shall think proper."

The tenth article is "*until the pleasure of congress be known respecting the ninth article*, all traders, *citizens of the United States*, shall have liberty to go to any of the tribes or *towns of the Cherokees*, to trade with them, and *they shall be protected in their persons and property, and kindly treated.*"

I have already remarked upon the ninth article in advance, that it conceded no right to the United States to interfere with the internal government of these people. It was a mere stipulation that the United States might regulate the trade *with them;* manifestly meaning the trade between the citizens of the United States and them; and the ninth article illustrates the only species of regulation within the contemplation of the parties, to wit, the sending citizens of the United States into the Cherokee territory, in the character of traders, to furnish them with such articles as they might stand in need of, and on such terms as they and the traders should agree on. And I have shown that this voluntary stipulation on the part of the Cherokees was, according to the law of nations, in strict consonance with the continuance of their political existence as a separate and sovereign state. The closing words of the tenth article, "and of managing all their affairs in such a manner as they (congress) shall think proper," are to be compared with the introductory words of the article; with the other stipulations of the treaty; with the practical exposition given to the article by congress; and with the whole train of subsequent treaties made with the same nation down to the year 1829: and it will be made manifest that these words, *however general*, were not intended or understood as surrendering the nation into the hands of congress in the light of a conquered people, to deal with them as they pleased. Such a construction would be wholly irreconcilable with the acknowledged right to redress their grievances by war against the United States, if amicable redress could not be obtained. How these

English words, "managing all their affairs in such manner as they think proper," could have been interpreted to the Cherokees, we cannot know. But this is clear. The Cherokees knew by the other articles of the treaty, by the boundary line which was to separate them from the whites, by the right which they reserved to themselves to punish white intruders upon *their territory, at their own discretion;* and by the stipulation to surrender fugitives from justice who should have *taken refuge within their nation*, that they were to remain a *separate and independent nation*, to be governed by their own laws, usages and customs; and by the assertion of their right to make war upon the United States, on a demand and refusal of a redress of grievances, they knew that they were still to be a *sovereign nation*, with the great and decisive right of war and peace. It is impossible, therefore, that they could have understood these words, as giving congress any right to interfere with that independence and sovereignty which were so dear to them. They could scarcely have supposed that such a design, one so hostile and revolting to all their habits and feelings, could have been masked under the very friendly words which introduce the article, "*for the benefit and comfort of the Indians, and for the prevention of injuries and oppression on the part of the citizens.*"

Congress never understood these words as giving them the right of taking their government out of their own hands, or in any manner interfering with their self government, or property, or as authorising any thing more than to license traders to settle among them and supply their wants, and to punish the whites who should trespass upon their property, or commit frauds upon them, and then fly from punishment into the white settlements. Regulations such as these fairly belonged to the objects announced by the introductory words of the article: they tended to promote the benefit and comfort of the Indians, and to prevent the perpetration of injuries and oppressions upon them; while they had not the slightest tendency to impair their political existence *as a state*, and as a *sovereign state*, in the sense of the law of nations. The whole tissue of the subsequent treaties, and the whole legislation of congress with regard to them, will make it manifest

that that body never understood this article in a broader sense than I have indicated.

We have another key to the exposition of this article in the old articles of confederation themselves. In the enumeration of the powers of the old congress under these articles, it is said, in article the ninth: "the United States in congress assembled shall also have *the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians, not members of any of the states.* The similarity of the language here used, with that which we find in the ninth article of the treaty of Hopewell, would justify the belief that the commissioners of the United States had the same object in view, to wit to secure *to congress, in exclusion of the states*, the right to manage the whole intercourse with the Indian nations; and to secure this exclusive privilege by the consent of the Indians themselves: that is to say, the exclusive privilege of negotiating and treating with them, and of regulating the trade and managing all affairs in relation to the intercourse between the citizens of the United States, and the Indian tribes. In the treaty of Hopewell the language of the treaty is, "of regulating their trade and managing all their affairs;" in the article of the confederation it is "of regulating the trade and managing all affairs with them:" the idea is manifestly the same, with a very slight variation in the language, and amounts only to this, that *congress should have the power, exclusive of any other authority within the United States*, of regulating the trade between the citizens of the United States and the Indians; and also of managing all other affairs relative to the intercourse between the citizens of the United States and the Indian nations, which required such management, from without: and surely it is perfectly indifferent to the question of the continued existence of the Indians *as a state* and *a sovereign state*, whether the trade and intercourse between the citizens of the United States and themselves were managed by the authority of congress, or by the several states.

This construction of the ninth article of the treaty of Hopewell, to wit, that it meant nothing more than to secure to *congress, exclusive of the states*, the regulation of the trade and management of the intercourse with the Indian nations, is strongly

corroborated by the analogous provision of the subsequent treaty of Holston; by the second article of which, the Cherokee nation stipulate that they "will not hold any treaty with any foreign power, *individual state, or with individuals of any state.*"

But under no construction that can be fairly put upon the article, can the Indian nation be considered as having intended to surrender thereby their exclusive right of self government within their own territory, and their right of making war and peace, even with the United States; which we have seen by Vattel are the touchstones of the political existence and sovereignty of a state.

Before we leave the treaty of Hopewell, there is another article, of curious structure, to which it may be proper to advert. It is the twelfth, and is in these words: "that the Indians may have full confidence in the justice of the United States respecting their interests, they shall have the right to send *a deputy* of their choice, whenever they think fit, to congress." What is the meaning of this article? in what character was this *deputy* to be sent to congress? The members of the old congress were called *delegates*, not *deputies*. It cannot be supposed, for a moment, that this *deputy* was to be received in a *legislative capacity* on the floor of congress. But the previous articles of the treaty having stipulated that congress should regulate the trade and manage the intercourse between the citizens of the United States and the Cherokee nation, this nation had an interest in seeing that this trade and intercourse were placed on a just footing, and was therefore authorized to send a deputy, in a diplomatic or ministerial, not in a legislative capacity; that he might superintend these regulations while they were yet under the consideration of congress, and see that no injustice was done by them to his nation. He was not to have a voice on their passage, but he would have had a right to object to them in advance: and there can be no doubt that if those regulations were deemed by his nation unjust and oppressive, they would not have hesitated, in the relative strength which they then possessed and the warlike propensities by which they were animated, to have resorted to the measures indicated by the eighth article of the treaty; "*a demand of justice, and, if refused, a declaration of war.*"

This article is illustrated by the practice which has long prevailed with several of these nations, of sending a delegation to the seat of government *during the session of congress*, to superintend their interests; and this practice no more detracts from their character, as a separate and sovereign political community, than the more formal diplomatic ministers from foreign parts, who reside at the seat of government with the same view, can draw into question, by that act, the sovereignty of those who send them.

This treaty of Hopewell, then, so far from presenting us with the picture of a people subjected by conquest, dissolved as a state, and merged into the mass of citizens of the United States; gives us, on the contrary, in every article, the image of a separate, a powerful, and a martial nation, proud and jealous of their independence; marking a boundary between themselves and the citizens of the United States; asserting the exclusive right of self government within their own territory, and the lofty and decisive right of vindicating themselves by force of arms against any attempted injustice on the part of the United States themselves. The concessions which they make to the United States are *voluntary concessions*, and they are such as leave them, according to all the writers on the law of nations, in the character of a *separate political community, a state* and *a sovereign state*. The few idiomatic expressions which appear in some of those articles, and which have been sometimes supposed to favour the idea of an admitted conquest, must have disappeared in the interpretation made of them into their own language, in which nothing could be seen and understood by them but the *substance* of the articles themselves; and the feeble and unfair inferences, drawn from their loose expressions in a foreign language, are entirely eclipsed by those strong and decisive stipulations, which continually present them in striking contrast with *the citizens of the United States;* mark them off and set them apart as a separate political community, with the power of self government, and even of life and death over the white citizens who intrude into their territory; and acknowledge in them such a legitimate power of retaliation and war against the United States, as could have belonged only to a distinct, independent, and sovereign nation.

But, if these few crude expressions in a treaty, made at a time and under circumstances like those in which the treaty of Hopewell was negotiated, should still be deemed of any consequence; what shall we say of the far more solemn and deliberate treaty of Holston made six years afterwards, under the immediate direction of president Washington, in which all these expressions of superiority on the part of the United States disappear, and the stipulations are presented, as they always ought to be presented, *fairly, in their naked substance?*

This treaty demands a separate analysis with reference to the question now before us: the existence of the Cherokee nation as a separate state. But before I proceed to this analysis, permit me to recall the attention of your honours to the solemnities with which this treaty was preceded and followed: for they are such as, I believe, have never accompanied any other treaty, not only with an Indian nation but with any other foreign nation however potent and august; and they mark it with an emphasis, to which, I should think, every serious and correct mind cannot fail to attend with peculiar respect and interest.

The federal constitution had now been adopted: and the government under it organized. Georgia was a member of the union, and was, of course, represented in the senate. The state of our relations with the Indians was an early and prominent object for consideration with the illustrious man then at the head of our affairs. No one better understood those relations. No one regarded them with a stronger sense of justice or with a deeper wisdom. It appears by the journals of the senate, that on Saturday, the 22d of August 1789, he came into the senate attended by general Knox, the secretary of war, and, in solemn form, laid before that body, the state of facts as they existed between the Indian tribes and the states, and submitted at the same time, *for the advice and consent of the senate*, certain leading principles of policy which he proposed to pursue towards the Indians. These principles were embodied in seven distinct interrogatories; the fourth of which is, "whether the United States shall *guaranty* to the Creeks their remaining territory, and *maintain the same, if necessary, by a line of military forts?*" Here we have president Washington's exposition of what is

meant, in these treaties, by a *guarantee:* it is a solemn pledge of protection against intrusion upon, and invasion of their territory, and *the maintaining of that pledge by military force if necessary.*

Again, on the 11th of August 1790, president Washington sent a special message to the senate, the subject matter of which he introduces by the following suggestion. "Although the treaty with the Creeks may be regarded as the main foundation of the future peace and prosperity of the south western frontier of the United States, yet, in order fully to effect so desirable an object, the treaties which have been entered into with other tribes in that quarter *must be faithfully performed on our part.*"

He then reminds the senate that by the treaty of Hopewell the Cherokees had placed themselves under the protection of the United States, within the boundary designated by that treaty; that the white people had violated that boundary by settling beyond it; *that he was determined to exert the powers entrusted to him by the constitution in order to carry into faithful execution the treaty of Hopewell,* unless a new boundary should be arranged by treaty with the Cherokees, embracing the extensive settlement, and *compensating the Cherokees for the cessions which they should make on the occasion;* and he finally asks the advice of the senate whether overtures should be made to the Cherokees to arrange such new boundary, and whether, in the event of such arrangement being made, *the United States should stipulate solemnly to guaranty the new boundary which might be arranged?* The senate, in which the state of Georgia was represented, answer by the following resolution:

"Resolved, in case a new or other boundary than that stipulated by the treaty of Hopewell shall be concluded with the Cherokee Indians, that *the senate do advise and consent solemnly to guaranty the same.*"

Such were the unusual and impressive solemnities which led to the treaty of Holston. Did the president and senate consider the Cherokees as an extinguished nation: a nation no longer capable of contracting obligations by treaty, by which the parties were to be reciprocally and for ever bound? Could these men have been capable of such a solemn scene of

mummery and fraud? For what could it have been but the grossest and basest fraud, to draw from these credulous and confiding Indians a concession of their lands on the faith of stipulations which the United States considered at the time as of no effect, and meant to violate whenever their interest should require it?

But, may it please your honours, there was no such thought at that day. Those were days of simplicity and integrity; in which men said what they meant and meant what they said. The gravity, the high honour, the dignity of the parties concerned, forbid the degrading suspicion of any foul or hollow mental reservation. The previous conferences between the president and senate, when there were no Indians near to witness them, evince their sincerity and good faith, and demonstrate that they regarded the Cherokee nation as a separate political community, capable of contracting, by treaty, obligations which were mutually binding in the sight of men and heaven.

Let us pass to the treaty itself, and we shall see the most obvious and convincing proofs, that such was the light in which the Cherokee nation was regarded. This treaty of Holston is headed, "*a treaty of peace and friendship*, made and concluded between the *president of the United States of America on the part and behalf of the said states*, and the undersigned chiefs and warriors of the Cherokee nation of Indians *on the part and behalf of the said nation.*" Here you have the *contracting parties* presented, in striking contradistinction. The *United States* on the one hand, and *the Cherokee nation* on the other, are exhibited as distinct and separate nations, with equal capacity to treat in their public character, and to bind themselves by the obligations of a treaty. The treaty has all the forms and ceremonies of the most solemn treaty made with any foreign nation of the most undisputed sovereignty. William Blunt, the commissioner on the part of the United States, is represented in the preamble as having been *vested with full powers for the purpose, by and with the advice and consent of the senate of the United States;* and on the other side, the undersigned chiefs and warriors as representing the Cherokee nation; and in the conclusion we have the article required by

our constitution and found in all our foreign treaties, that, "this treaty shall take effect and be obligatory on the contracting parties, *as soon as the same shall have been ratified by the president of the United States, with the advice and consent of the senate of the United States.*"

The very objects of the treaty, as announced in the preamble, are a clear and palpable admission, that the Cherokee nation formed no part of the United States, but that they were a separate and sovereign political community in themselves: "the parties being desirous of establishing *permanent peace and friendship*, between *the United States* and *the Cherokee nation*, and *the citizens and members* thereof, and *to remove the causes of war*, by ascertaining their limits and making other necessary, just and friendly arrangements." Is this a language to be used towards a conquered people, a people who had lost their separate political existence and had become amalgamated with the common mass of the citizens of the United States? Would such a treaty have been made with a part of the citizens of Georgia, as Georgia claims the Cherokees to be? The idea is manifestly preposterous. Could such a treaty have been made between the United States and even the whole state of Georgia? The proposition is entirely repugnant to our constitution, and to the relation which the state of Georgia bears to the union. That state has no political capacity to enter into any such treaty with the United States. Yet the state of Georgia claims to be and is a sovereign state: while we are gravely discussing the question, whether the Cherokee nation with this admitted capacity to treat with the United States, to treat with them of peace and war, and actually treating with them on these, be even *a state!*

But let us proceed to a closer examination of the provisions of this treaty. "Article 1. There shall be perpetual peace and friendship *between all the citizens of the United States* and *all the individuals composing the whole Cherokee nation.*" Here is the obvious admission that *the citizens of the United States* and *the individuals composing the Cherokee nation* are different people, belonging to different nations; the individuals composing the Cherokee nation are not then citizens of the United States; and by unavoidable consequence they are not citizens of the state of Georgia or any other state of this union;

for if they were citizens of any one state, they would neeessarily be citizens of the United States. The fourth article marks "the boundary between *the citizens of the United States* and *the Cherokee nation.*" The treaty then contemplates them as being to reside on the very territory which they now occupy, and still declares them to be *separated, on that territory, from the citizens of the United States.* They are, therefore, on that territory, *not citizens of the state of Georgia*, and by unavoidable consequence are not subject to the laws of that state, while on that territory. But the treaty goes on to acknowledge, in the clearest terms, the exclusive right of the Cherokee nation to give the law within their own territory; and that that territory lies without the jurisdiction of any state of the union. Thus the eighth article declares that "*if any citizen of the United States*, or other person, not being an Indian, shall settle on any of the *Cherokee lands*, such person shall forfeit the protection of the United States, and *the Cherokees may punish him or not, as they please.*" Here are the clearest and most unequivocal admissions that *the lands* within their boundary are *the lands of the Cherokees;* that within their territorial line they are to give the law, and may punish even white intruders as they please.

Permit me for a moment to step aside from the point immediately before us, to ask whether it is competent for the state of Georgia, with this treaty in full force, to say that these lands are not the lands of the Cherokees; to take them from them; to cause them to be surveyed as part of the ungranted lands of that state; and to dispose of them among her own citizens by a public lottery? Is it competent for that state to declare that the Cherokees shall not give the law within their own territory, but that it shall be a crime in them to do so; a crime indictable before the state courts of Georgia, and punishable by imprisonment in the penitentiary of that state for four years: and that if the Cherokees shall punish a capital offence committed by one of their own people, within their own territory, by a capital punishment, it shall be *murder* in judges, jurors and sheriffs; and that the whole of them shall be executed on a Georgia gallows, for this alleged offence? Yet such are the laws which the state of Georgia has passed, and which they will execute; unless restrained by the authority of this court.

Again, the eleventh article of the treaty of Holston contains an admission equally clear and unequivocal, that the territory of the Cherokees is not *within the jurisdiction* of any one of the states. It relates to citizens of the United States who shall go within that territory and commit offences, and then retreat within the jurisdiction of the states: and the provision is that "if any *citizen of the United States* shall go into *any town, settlement, or territory belonging to the Cherokees*, and shall there commit any crime, or trespass against *the person or property* of any peaceable and friendly Indian or Indians, which, *if committed within the jurisdiction of any state*, or *within the jurisdiction of either of the said districts*, against *a citizen* or *white inhabitant* thereof, *would be punishable by the laws of such state or district*, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner, *as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong*, against a citizen or white inhabitant thereof."

Can there be a more distinct and explicit admission than we find here, on the part of the United States, that the Cherokee territory is not within the *jurisdiction* of any state of the union, but that it is *the territory of the Cherokees and within their sole jurisdiction?* What is *jurisdiction?* Is not its universal acceptation *the right to give the law?* The affirmation of the treaty then is *that no state of the union has a right to give the law within that territory, but that the Cherokees alone have the right to give it.*

Let me again digress to ask whether, with this treaty in full force and acknowledged to be in full force by all the subsequent treaties between the United States and the Cherokee nation; it be competent for the state of Georgia to give the law within that territory; to give it exclusively; and to make it highly penal in the Cherokees to do what that treaty declares that *they alone* have the right to do? Is it competent for the state of Georgia to send her sheriffs and constables to commit trespasses and crimes against the Cherokees within their own territory, by the seizure, transportation, and imprisonment of their persons, nay, by the execution of their persons, as was recently done in the case of Tassels; and to wrest from them

by force the property consecrated by those treaties? Yet this is what the state of Georgia has done, and will continue to do, unless restrained by the authority of this court. But to the point.

With the provisions which we have been surveying, full in our view, can there be a doubt that the Cherokee nation stands solemnly recognized by the United States as a separate political community, acting by the public authority of their own nation, for the good of the whole; authorized to give the law exclusively within their own territory; and capable of contracting, in their sovereign capacity, with the United States, in the form of treaty, and binding themselves as well as the United States, by the obligations of such treaty? Let us proceed farther with this treaty.

By the fifth article "it is stipulated and agreed that *the citizens and inhabitants of the United States* shall have a free and unmolested use of a road from Washington district to Mero district, and *of the navigation of the Tennessee river.*" Where was the necessity or propriety of such a stipulation, if the whole territory and the navigation of that river belonged to the respective states. A stipulation for a right of passage through the territories of an independent, sovereign state is natural enough and common enough. But nothing could be more idle and preposterous than for the rightful owners to ask such a stipulation from those who had no right.

The ninth article stipulates that "no *citizen or inhabitant of the United States shall go into the Cherokee country*, without *a passport* first obtained from the governor of some one of the United States or territorial districts, or such other person as the president of the United States may from time to time authorize to grant the same." What could be more absurd or unconstitutional than such a stipulation as this with a part of the citizens of Georgia, with regard to a portion of the territory of that state? But the article distinctly admits the *territory to belong to the Cherokees;* and so exclusively to belong to them, that it required a treaty stipulation on their part to authorize *a citizen of the United States* to enter it, even on an innocent visit of curiosity, which, under this stipulation, he could, at last, only do by the aid of *a passport*, made out according to the treaty.

The tenth article again stipulates, as had been done in the treaty of Hopewell, for the surrender of fugitives from justice who shall take refuge in the Cherokee nation: a stipulation wholly idle on the hypothesis that the states or United States had a previous right to arrest such fugitives within the Cherokee territory; and having no sense or utility in it, except on the opposite hypothesis, which, indeed, pervades the whole treaty; that the *jurisdiction* of that territory belonged *exclusively* to the Cherokees, in the character of a separate sovereign state.

The twelfth article again contains the recognition of the reciprocal and equal right of war on the part of the Cherokees against the United States, in the event of a demand and refusal of satisfaction for injuries: which, I repeat it, is, in itself, a decisive admission of their independence both of the states and of the United States, and of their continued existence as a *separate sovereign state.*

The seventh article contains the *guarantee*, so often spoken of, which had been the subject of previous consultation and arrangement between the president and senate of the United States:

"Article 7. The *United States solemnly guaranty* to the *Cherokee nation* all their lands not hereby ceded:" that is to say, *the United States pledge the faith and honour of this nation, to protect and defend the Cherokees, by force of arms if necessary, in the possession and enjoyment of all their lands not ceded by treaty:* for such we have seen is the exposition of *a guarantee*, as given by president Washington and approved by the senate. The states of this union, the state of Georgia included, are the parties to this guarantee. The engagement is not that they will not themselves disturb the possession, but that they will not permit it to be done by others. Each state of the union stands bound, as a member of the confederacy, by the most solemn pledge of faith and honour, given in the sight of man and God, that she will *not permit it.* It is no excuse, therefore, to the several states which compose this union to say that *they* are not *disturbing* the Indian possession: for their engagement is that they will not *permit* it to be done by others; but, on the contrary, that they *will prevent it, by force of arms if necessary.*

Being then *bound* to *prevent it*, this pledge is not redeemed by expressing regret at it, and crying out "*shame*" on the offending state. The obligation which they have assumed is not one of sentiment, which is to be acquitted by heaving a sentimental sigh. It is an obligation of *action*, and of *vigorous and effectual action*. The United States have undertaken, in the most solemn form, *to protect the Cherokees* or their possessions by force of arms if necessary; and if, thus engaged, they permit that possession to be invaded, they are *participes criminis*, and equally guilty with the invading state. There is no moral difference between them; and if these things *shall* be *permitted*, the faith and honour of this nation are gone; they are not worth a rush. *Punic faith* will be quite as respectable in history.

Is it that the Cherokees are now weak and unable to call us to an account, that we hold ourselves absolved from the obligations of this treaty? Are we so lost to character as to excuse ourselves on this ground, and to make the tacit admission, that we hold ourselves bound by our engagements only so long as we can be compelled to fulfil them? That we will be *very faithful* and *honourable to the powerful*, who can punish us for being otherwise; but that as to the weak, we will be only just *so far faithful as suits our ease and convenience:* and that having solemnly undertaken to defend such, by force of arms if necessary, we consider the obligation as sufficiently discharged by the unprofitable expression of our sympathies and our regrets. If such be the point of degeneracy, to which we have already sunk since the age of Washington, farewell to the honor of the American name: happy it is for that patriot that he was called from this scene of things, before he witnessed this heart-sickening degradation of his country.

But let us turn from this affecting view, to the course of the argument before us, in the hope that we shall find here a mode of redemption for the plighted faith of our country, and a door of escape from the national disgrace that threatens us.

This treaty of Holston is so decisive of the point before us, the solemn recognition by the United States of the separate existence of the Cherokee nation as *a state*, that those who advocate the laws of Georgia have resorted to various modes

of getting rid of it. Among other things it has been said, that it is an *old treaty*, made more than forty years ago; and the tacit inference is, that it has become obsolete and of no effect, *from age*. But where is such a principle to be found in the law of nations, or in the reason of things? The treaty is declared on its face to be a *permanent* treaty, not a *temporary* one: and according to all the authorities, as well as the reason of the thing, *the intention* of the parties is to give the measure of the duration of the treaty, as well as the meaning of its stipulations. The treaty of peace which closed the war of our revolution is much older than this: but we should think it very wild and strange in Great Britain to dispute the territorial boundary or the independence acknowledged by it, on the ground that the treaty was old and obsolete: yet there would be quite as much sense and reason in the one pretension as the other.

It is needless, however, to meet this question on general grounds, because the treaty of Holston has been continually recognized by the United States, and the guarantee given by it has, by a subsequent treaty, been made *perpetual* in express terms. It was recognized by name in the treaty of Philadelphia, of 1794, as subsisting to all intents and purposes in full force. So, also, in the treaty of Tellico of 1798; by the sixth article of which the United States declare, that they "will continue the guarantee of the remainder of their country *for ever, as made and contained in former treaties*. By the treaty of Tellico of 1805, all former treaties, which provide for the maintenance of peace and prevention of crimes, are recognized and continued in force. By the fifth article of the treaty of 1817, made at the Cherokee agency, *all former treaties* are continued in full force; and the latter treaty, that of 1817, is continued and identified with the last treaty made with this nation, which was in the year 1819. Thus we have the treaty of Holston recognized sometimes specifically by name; at others by description, as belonging to the class of treaties providing for the continuance of peace and the prevention of crimes; at others in common with all the past treaties: and we have the guarantee which it gives, declared in express terms to be *obligatory for ever on the United States*.

I have dwelt thus long on the treaty of Holston, not because it exhibits the Cherokee nation in any peculiar light

different from the subsequent treaties, but because it was the first treaty made with them after the adoption of our federal constitution, because of the great and patriotic name under whose immediate sanction and direction it was made, and because of the very unusual solemnity of previous consultation with the senate, by which it was preceded. It was a measure taken with unexampled deliberation, by a great and wise and good man; who had the advantage of having known, in person, the relation in which these people had stood to the antecedent government of Great Britain, and of observing and understanding all the political effects which flowed from our revolution, with regard to these people. We see him, in this treaty, solemnly acknowledging the Cherokee nation as a nation, separate and distinct from the United States, having a political existence and public character, which gave them a capacity to form treaties with the United States; which were equally obligatory on both the contracting parties: as having a territory of their own, surrounded by a boundary which separated them from the citizens of the United States; within which boundary they had the sovereign and exclusive right of giving the law, and from which territory they had the right, which sovereigns only could have, of waging legitimate war against the United States: and we see this treaty first solemnly advised, and afterwards as solemnly ratified by the senate of the United States; of which senate the state of Georgia, the defendant in this motion, was a component part.

If a few loose expressions in the comparatively hasty treaty of Hopewell, and those fairly referable to the peculiarities of our language, which probably disappeared in the interpretation made at the time to the head men and warriors of the Cherokee nation, should be supposed to give colour to an inference that the Cherokees acknowledged themselves to be a conquered people, lying in future at the mercy of their conquerors; what shall we say to the entire disappearance of all those expressions in the more solemn, deliberate, and well-weighed treaty of Holston. We have nothing here about the United States *giving peace* to the Cherokees: nothing of their *allotting* hunting grounds to them; nothing about *managing* all their affairs; nothing of *sending a deputy* to congress. The stipulations are reduced to the simplest forms, in

a language uncoloured by any assumption of superiority on the part of the United States; and these stipulations, we have seen, are of such a substance, in regard to the Cherokees, as to be inapplicable to any kind of political existence, known to the law of nations, short of that of *a state*, and a *sovereign state*. Any inference, then, drawn from these expressions in the treaty of Hopewell (equivocal at the best, and at variance with the substantial provisions of that treaty itself), must vanish before the stronger and perfectly unequivocal light in which the treaty of Holston presents this nation before us. If the states of this union be *states* in the sense of our constitution, which cannot be contradicted; the Cherokee nation are, *a multo fortiori, states*, in the sense of the same instrument. Indeed, there is no one element in the definition of *a state*, as given to us by all the approved writers on the law of nations, which is not found to exist in full force in the Cherokee nation: while by the same law we have seen that there is nothing in the circumstance of their placing themselves under the protection of the United States, nor in any other stipulation of their treaties, which degrades them from the rank of *states*, and of *sovereign states*.

There is I know not what vague idea among us, that these nations cannot be states, because they are Indians, ignorant savages, wild and wandering hordes, mere heathens, very little if at all superior to the beasts which they chase. This is a remnant of that superstition which led Pizarro and Cortez to hunt down the Mexicans with blood hounds; and which proved them (Christians though they styled themselves) to be far worse *savages* than those whom they persecuted under that name. It is not the tincture of a skin by which the rights of these people are to be tested. We are beginning to recover from our mistake on this ground, with regard to another unfortunate race. Let us not create for ourselves, and place in the hands of a just God, a new scourge of a similar description.

However variously coloured by difference of climate or other adventitious causes, the human beings who people this globe belong to the same family, and derive from their common Parent equal rights. We see them, all over the earth, formed into nations of different hue, without the slightest question of their sovereignty on this ground. And as to their

being savages, heathens, and ignorant wandering tribes, even if this were still the case, which we know it is not, it would not detract from their independence and sovereignty *as states;* nor weaken in the slightest degree the obligation of those treaties which we have thought proper to form with them.

It was, indeed, once made a question whether treaties with heathens were binding on Christians, the other contracting party. "Grotius (says Vattel, b. ii, c. xii, § 16) has treated this subject at large, and this discussion might be necessary at a time when the madness of party still darkened those principles which it had long caused to be forgotten; but we may venture to believe that it would be superfluous in our age. The law of nature alone regulates treaties; the difference of religion is a thing absolutely foreign to them. Different people treat with each other in quality of men, and not under the character of Christians or Mussulmen. Their common safety requires that they should treat with each other and treat with security. Every religion that should in this case clash with the law of nature, would bear upon it the marks of reprobation; and it could not come from the Author of nature, who is *always constant, always faithful.*"

Would to God that the religion, of which we boast in theory, may be marked in practice with those divine traits. But if the tree be to be judged by the fruits, and the fruit of the Christian tree be *to do unto others as we would they should do unto us,* it is much to be feared that there are few nations on the earth that could rightfully revive the discussion of Grotius. May we be found to be one of these few.

The Cherokees, however, are no longer subject to the charge of heathenism. The religion of the cross has been introduced among them; and, most opportunely for them, has been embraced extensively. Such is the allegation of the bill, and it remains to be contradicted by an answer.

If it be necessary to the political existence of a state, that they should cease to be wandering savages: they have ceased. They have become cultivators of the earth, herdsmen, and mechanics. If it be necessary to their political existence as a state, that they should have a settled and organized government, and a regular administration of laws and justice: they have them all; and, until this invasion of their rights, were

prospering in peace and advancing rapidly in civilization and religion.

But such is the strange perverseness of the human mind, especially when darkened and distorted by interest; that this very change in their intellectual and moral condition; which, one should have thought, *a priori*, would have removed all shadow of objection to the force of any treaties with them; has become itself an offence, and a new and substantial ground of persecution. Georgia, as one of the United States, has been labouring for nearly half a century, in conjunction with her sister states, with the most humane and christian assiduity and perseverance, to bring about a change in the intellectual and moral condition of these people; and having completely effected the purpose, she finds in this very change a ground of quarrel with her pupils, as well as with her sister states, her auxiliaries in this work of piety; accusing the latter of a hypocritical affectation of benevolence in bringing about this reformation, and the former of a violation of her sovereignty in setting up an independent government within her chartered limits. So long as they were savage, they were permitted to govern themselves by their own laws and customs without complaint; but having now, under the tuition of Georgia and the other states of the union, become civilized; and having established a regular and well balanced government, and a code of just and rational laws, their right of self government is at an end. So it would seem that, in the estimate of their preceptress, their right to govern themselves diminishes in the ratio that their capacity for self government increases, and expires entirely when that capacity becomes complete.

What can these unfortunate people do that will give satisfaction to the state of Georgia? While they were in their original hunter state, and fierce and powerful in war, their inroads on the frontier were the constant theme of complaint; and it was thought on every hand to be the true policy, as well as the Christian duty, of the United States, to endeavour to reclaim and civilize them. This wish was indicated to them by the treaty of Holston; negotiated, as we have seen, under the immediate direction of president Washington. The fourteenth article of that treaty is in these words: "that the Cherokee nation may be led to a greater degree of civilization, and to become herdsmen and

cultivators, instead of remaining in a state of hunters, the United States will, from time to time, furnish gratuitously the said nation with useful implements of husbandry; and farther, to assist the said nation in so desirable a pursuit, and at the same time to establish a certain mode of communication, the United States will send such and so many persons to reside in said nation, as they may judge proper, not to exceed four in number, who shall qualify themselves to act as interpreters. These persons shall have lands assigned to them by the Cherokees for cultivation for themselves and their successors, but they shall be precluded from exercising any kind of traffic."

The policy here announced was pressed by general Washington during the eight years of his administration with all the earnestness and energy which distinguished his character, and was followed up by his successors with so much prosperity, that in 1808 the upper towns communicated to president Jefferson their anxious desire *to renounce the hunter state*, and *to engage in the pursuits of agriculture and civilized life in the country they then occupied;* and they were encouraged by him so to do, *by the assurance of the patronage, aid, and good neighbourhood of the United States.* This fact is recited in the preamble to the treaty of 1817, and that treaty was expressly made to give effect, among other things, to the accomplishment of this purpose. This was followed by the treaty of 1819, one of whose avowed objects it is to enable these Cherokees to *commence without delay the measures which they deem necessary for the civilization and preservation of their nation;* and, by the same treaty, the United States accept a cession of their lands, in trust, to *form a school-fund, to be* applied under the direction of the president of the United States "*to diffuse the benefits of education* among them."

Thus, as their exclusive right to give the law within their own territory had been recognized by the treaty of Holston, their right to give it, *in the character of a civilized nation*, is recognised by these latter treaties: and if an organized government, and a code of rational laws, well administered, be essential to the consummation of their character as *a state*, that consummation has now been given under the sanction and co-operation of the United States.

They have been sometimes called Indian *tribes:* does *this name* touch the question of their political existence as *a state?* I apprehend not: for the name has no connexion whatever with the *political character* of the people to whom it is applied. The word tribe is defined by Webster; 1. A family, race or series of generations descending from the same progenitor, and kept distinct, as in the case of the twelve tribes of Israel, descended from the twelve sons of Jacob. 2. A division, class or distinct portion of people, from whatever cause that distinction may have originated. The different nations of this earth have all descended from the same progenitor, and, in reference to their common origin, may with strict propriety be called tribes. The Jews, in the height of their national glory, were still but *tribes.* David and Solomon, in succession, ruled over ten of these *tribes* in the land of Judea: were they not *states,* and *sovereign states* too? Rome and Athens were both divided into *tribes*: did they, for this reason, cease to be *states.* With regard to the Indians, the term *tribes* conveys no other idea than that of their division into separate nations, as the Cherokees, Chicasaws, Choctaws, Creeks, &c. We see that in these treaties they are called *nations,* not *tribes.* It is not a name, however, by which the political condition of a people is to be tested. Whether a separate community be called *a nation* or *a tribe,* we have seen that if they possess the independent power of self government, of making legitimate war and of terminating these wars by treaties of peace, they are *states* in the sense of the law of nations: and by these tests it seems to us incontrovertibly clear that the Cherokee nation is *a state.*

Are they *a foreign state* in the sense of the constitution? Now it is admitted that unless they be, this court cannot take original jurisdiction of the subject.

The question being as to what is meant by *a foreign state* in that part of the constitution which marks out the original jurisdiction of this court; it is proper to look to the passage itself, to observe the connexion in which the terms are used and the ideas associated with it, and thus to collect from the context, the meaning of the instrument.

According to the constitution as first adopted, the original jurisdiction of the supreme court extended,

1. To controversies between *two* or *more states;* meaning, as all admit, two or more *states of this union.*

2. To controversies between *a state* and citizens of *another state;* still meaning *states of the union.*

3. To controversies between *a state* (that is a state of the union) and *a foreign state;* which can mean only a state *foreign to the union:* and the first and third heads of jurisdiction remain untouched by the eleventh amendment.

The parties presented under the first head as founding the original jurisdiction of this court are *two or more states.* No one disputes that this means *states of the union.*

The parties presented in contrast under the second head are, on the one hand *a state,* which no one can dispute means *a state of the union;* and on the other a *foreign state:* foreign to what? Manifestly foreign to that union to which the other state belongs. The only ideas presented to the mind are *a state of the union* and *a state out of the union.* The ideas are *purely political,* not *local* or *geographical.* The only distinction awakened in the mind is the distinction between a state of the union, and a state foreign to the union. And this construction, forced upon the understanding by the context, is confirmed by a consideration of the reason which manifestly prompted this provision in the constitution; which was to offer to the foreign state the most impartial tribunal that our institutions afford, and the highest court of *the nation,* which could, alone, be known to them as *the nation.* For under our political institutions, foreign states, in their *national and public capacity,* can have no knowledge of the *state governments.* Their only intercourse is with the government of the United States. *With this government* they treat, and *from this government* they have the right to demand a fair construction and enforcement of these treaties. To this government they have a right to look for justice; and if a matter of judicial controversy arise between them and a state, the only proper tribunal for its settlement is the court of the government which exclusively conducts all our foreign relations: and this is more pre-eminently proper if the controversy arise out of a public treaty which they have previously negotiated *with the government of the United*

States. To refer them to the courts of the offending state itself, on such an occasion, would be mockery and insult.

If these views are sound (as I think they must be admitted to be), let us bring them to the case of the Cherokee Indians. We have proved that they are *a state;* are they *a state of this union?* Every one will answer *no:* then, by inevitable necessity, they are a state *foreign to the union,* and a *foreign state in the sense of our constitution.*

Is not their case as precisely within the *spirit and reason,* as *the letter* of the constitution? Is not this the only important tribunal which our institutions offer to them, when *one of the states of this union is the defendant?* In their political capacity can they know the governments of these states any more than any other foreign state? Can they treat with the states: are not their treaties necessarily with the United States? Is it not, then, from the government of the United States that they have a right to demand the fair construction and faithful performance of these treaties? And since this is a controversy with a state, growing out of their treaties with the United States; to what other tribunal can they be with any propriety, justice, or decency referred, but to the court of the government with which they have formed these treaties? Will you turn them over to the courts of the offending state? Would not this be as much mockery and insult in their case, as in the case of *any other foreign state, having a similar controversy?* Can any one motive be imagined for this provision in our constitution, which does not apply with precisely the same force to the Cherokee nation, as to any other foreign state? If not; the *spirit and reason* of the constitution, as well as *its letter*, clearly embrace their case, and imperiously call upon this honourable court to assume the jurisdiction.

I can anticipate no contrariety of opinion that can arise upon this subject, but from confounding the *political idea of a foreign state*, as presented by the constitution, with the *geographical idea* which the same expression might present in a different connexion. *Foreign* is a relative term of various signification, and its sense depends upon that relation; upon the thing with which it is compared, and to which it is put in apposition. The word "*foreign*" does frequently give the idea of *mere locality*, without regard to jurisdiction; but

even in this sense, its signification varies with the idea with which it is compared in the mind of the speaker. The inhabitants of a village call every stranger *a foreigner*, although he may reside in the same county; the comparative idea being that of the village. In our large commercial cities, a *foreigner* gives the idea of one from a distant country, the comparison being made with the whole United States. In London, a man who is about to make a voyage to the East Indies is said to be going to *foreign* parts, although those parts may belong to the dominion of the same crown; the comparison being made with the British islands in the neighbourhood, without any reference to jurisdiction. We speak of goods of *foreign manufacture*, in comparison with and contradistinction from goods *made at home*, that is of *domestic manufacture*, without any reference to jurisdiction.

Sometimes the word presents a mere chemical idea, without any reference to *place* or *jurisdiction;* thus we speak of *foreign* ingredients in water, the standard of comparison being the element in its native purity.

At others it has a sense merely metaphysical; thus we say, such an intention was *foreign* to my *mind;* the mind, free from any such intention, becomes the object of comparison.

The adjective *foreign* joined to *the same noun*, will present a different idea when the object of comparison is different; thus, *foreign country* will mean a country *not within the jurisdiction of our own government;* or, it will mean simply *a distant country in point of situation*, accordingly as *jurisdiction* or *locality* be the several comparative ideas in the mind of the speaker. Thus Webster says, (*verbo "foreign"*) "we call *every country foreign* which is *not within the jurisdiction of our own government.* In *this sense* Scotland, before the union, was *foreign* to England, and Canada is now *foreign* to the United States. *More generally,*" he continues, "*foreign* is applied to *countries more remote* than an *adjacent territory;* as a *foreign* market, a *foreign* prince. In the United States all *transatlantic* countries are *foreign.*"

Thus, in order to ascertain the meaning of the word *foreign*, in any given case, it is indispensably necessary to ascertain the idea with which it is compared and to which it is opposed:

since it is that, *and that alone*, which gives the true measure of its meaning; as every experiment that we can make upon the subject will satisfy us.

Now let us turn again to the passage of the constitution under consideration, with reference to this object of ascertaining *the comparative idea* to which the word *foreign* is there opposed. The supreme court shall have original jurisdiction of all controversies between *a state of this union* and *a foreign state*. Is it not clear that *a state of the union* is the comparative idea, to which the *foreign state is opposed*, and consequently that *a foreign state* means any *state* which does not belong to the union?

Again, the constitution is a *political* not a *geographical* instrument, and it is here dealing, emphatically, with a question *of policy and jurisprudence*, not with one of *locality*. The word *state* is used in its *political*, not in its *geographical* sense. It means "a political body or *body politic*," as Webster defines it; or a separate community, under a government of their own, as the writers on the law of nations define it; or a separate political community acknowledged as such by the governor of the United States, as this court has defined it. In all which senses, the Cherokee nation is *a state*, and *a state foreign to our confederacy;* therefore *a foreign state* in the sense of the constitution.

If they be not *a foreign state*, and *a sovereign state*, by what right do the president and senate of the United States *treat* with them? Their power to make *treaties* is derived solely from the constitution of the United States. The term *treaty* is borrowed from the law of nations, and to that law we are, therefore, to refer for its meaning. Now, by that law, what is a treaty? "A treaty, in Latin *fœdus*, is a pact made with a view to the public welfare by *the superior power*, either for perpetuity, or for a considerable time." Vat. B. II, c. 12, § 152. By whom can such treaties be made? "Public treaties can *only* be executed *by superior powers*, by *sovereigns who contract in the name of the state*." Id. ib. § 154. Now as a sovereign cannot make a treaty with himself, he contracts only with another sovereign, each necessarily foreign to the other at the time of the treaty: for if they be *two sovereignties*, they are necessarily exclu-

sive of each other in their respective spheres. In what light, then, can these treaties, thus continually made by the president and senate of the United States, be regarded but as acknowledgements that the Cherokee nation is a *foreign sovereign, a foreign state:* since they have no constitutional right to form a treaty but with such a state?

To what branch of our government does it belong, under our constitution, to decide the question of "foreign state, or not a foreign state?" This question has been repeatedly raised before this court, and the uniform and unanimous decision has been, that it belongs exclusively to that branch of the government to which the conduct of our foreign relations has been entrusted by the constitution; the executive branch. It has been again and again argued here, that the revolutions in the colonies of France and Spain had reached such a point as that this court could regard them as *states*, in the sense of our constitution and laws: but the answer has invariably been, that *this court* could recognize none of these governments as *states, until they had been recognized as such by our own executive, to whom the question exclusively belongs:* and it follows, by necessary consequence, that *this court* cannot *refuse* to recognize as *foreign states* and as *sovereign states* those whom our *executive* has *recognized as such;* for if the power belong *exclusively* to the executive, their decision must be *conclusive.* Now what more solemn and decisive recognition of *a foreign and sovereign state* can the executive afford, than by making *a public treaty* with them? This has always been held conclusive by this tribunal: and this recognition of the *Cherokees* as *a foreign and sovereign state*, has been *constantly* afforded *by the president and senate of the United States*, from the foundation of our government to the present day. Can this court, then, refuse to recognize them as a *foreign state?*

Can it be denied, these treaties compose a part of the supreme law of this land, *in their character of treaties?* In a question of property brought before you, and turning on these treaties; could you say that they were *not treaties*, when the president and senate, to whom the question exclusively belongs, have so repeatedly declared that *they are treaties?* And if you would, *on a question of property*,

admit them to be *treaties*, does not this admission necessarily involve the admission that those with whom they have been made are *sovereign* and *foreign states?*

Are the Cherokees *citizens of the United States?* It is impossible to open any one of these treaties without reading the negative answer in every provision. They are perpetually mentioned *in contradistinction to the citizens of the United States.* The boundary of their territory is called *a boundary between the citizens of the United States, and the Cherokee Indians.* The *citizens of the United States* are prohibited from settling *on the lands of the Cherokees* under pain of such punishment as the Cherokees may choose to inflict. But it is needless to go through these provisions, for your honours must have observed that every provision, and almost every line, contains the demonstration that they are not citizens. Nay the general fact of treating with them involves the same demonstration.

But, independent of these treaties, we all know that they are not *citizens of the United States.* They owe no allegiance to your constitution; have no voice in your laws, and are not bound by them. They pay you no taxes; contribute nothing to the support of your civil list. They take no part in your foreign wars, unless they choose to do so. They can make war upon you themselves, without committing treason. This last feature of the case alone is, of itself, demonstrative of the fact that they are not *citizens of the United States.*

And if they are not *citizens of the United States* what are they; what can they be, but *aliens?* There is *no middle character* known to our constitution and laws. And if they be a *nation of aliens*, what can they be but a *foreign nation*, a *foreign state*, in the sense of the constitution?

That they are *aliens* has been solemnly decided in New York: and indeed there is no possibility of avoiding this conclusion, but by declaring them to be *citizens of the United States:* but this it is not possible to do but by abandoning the only established tests of *alienage* and *citizenship; the test of allegiance.*

Now if *the individuals* of this nation be *aliens*, they have a right to sue a citizen in the federal circuit courts; and if the *individuals of the nation* have a right to the jurisdiction of

your circuit courts, must not *the nation collectively* to which they belong have right to sue in this court, where *a state* is a party? Can your honours conceive a case in which an *alien* can sue in the circuit courts, where the state to which he belongs is not a *foreign state?* Does not the supposition involve a solecism in terms? If the individual be an *alien*, does it not follow, *inevitably*, that the state to which he belongs is a *foreign state?* And if so, the unavoidable admission that the Cherokees are *aliens* draws along with it the equally unavoidable conclusion that their state is a *foreign state* and, consequently, that they have a right to the original jurisdiction of this court, against a state of the union.

If, on the other hand, the Cherokee nation be not a foreign state, then the people of that nation are not aliens, and not being aliens, must be citizens of the United States: which no jurist, with these treaties and the constitution of the United States before him, can affirm.

Such are the views which have conducted the counsel of these people to the conclusion that they are authorised to stand before this court in the character of a foreign state, and to invoke its jurisdiction against the defendant.

What are the objections to considering them as a *foreign state?* Is it, according to the popular notion, that they are not a *transatlantic state?* Then Mexico is not a foreign state, which will hardly be affirmed.

Is it that they lie within the territorial limits of the United States? But this would be changing the *political idea* of a *foreign state*, which has been shown to have been that of the constitution, into a *geographical idea*, which is altogether foreign to the reason, spirit, and policy of this provision of the constitution. The design certainly was, to give to any and every state, *foreign to our confederacy*, a right to come into this court against *any state of the confederacy*, instead of driving it into the prejudiced courts of the offending state; to keep the construction of our national acts within the sphere of the national tribunal; and to prevent the multifarious tribunals of the states from compromitting, by their opposite and conflicting adjudications, the honour and peace of the United States! And these being the objects, of what possible consequence can it be whether the *foreign state* be on this conti-

nent or off it; or what may be its *local* habitation, or its name? If it be *a state foreign to our confederacy*, acknowledged by the executive to be foreign by the act of treating with it, and by the character of the stipulations contained in those treaties; the whole policy of this provision in the constitution bears upon them at once, in full force, whatever may be their place of residence, or their physical strength.

Is it supposed, that the fact of their being surrounded by the territory of the United States destroys their character of a state, and a foreign state? How does it happen that this effect was not produced upon the Hanse towns in Germany? Hamburg, now the head of these free towns, is surrounded by the dominions of Lower Saxony. They are all embosomed in the territory of some one or other of the German princes. Yet are they *states*, and *foreign states*, with a separate capacity of self government, and of treating with other foreign states.

It is not the local position, but the actual allegiance, which determines the question of *foreign* or *domestic*, with regard to *states*, in that *political sense* in which the judicial clause presents the subject. It is, we respectfully conceive, looking at the subject in a false point of view, to say that they cannot be *foreign* but must be *domestic states*, because they are surrounded by the territory of the United States: it is making it a *geographical* instead of a *political* question. It has happened, in divers instances, in ancient as well as modern times, that the same place has been, *alternately*, *foreign* and *domestic* as its actual allegiance has varied, without any regard to its local situation. The *Samnites* were yet a free and sovereign state, after the country all around them had been reduced by the power of the Roman arms: were they, because thus surrounded by the territories of Rome, a *domestic* state of Rome, or a state of Rome in any sense? On the contrary, so long as they owed allegiance only to their own laws they were a *foreign* state. But they lost that character when at length they bowed to the superior power of Rome; they were no longer a *foreign state*, but a part of the *domestic* empire of Rome. *Samnium* was still in the same place: it was not *locality*, therefore, that stamped the character of *foreign* or *domestic* in that country, but *allegiance merely*. Ancient history abounds with instances of this kind.

Let us come down to more modern times. England, for a long time, held several states in the heart of France, as completely surrounded by the territory of France, as the Cherokee territory is surrounded by the territory of the United States; and, *considered geographically merely*, as essentially and intimately incorporated with France as the Cherokee country with the United States. Yet, while the possession by England continued, these towns were *politically foreign* to France, and *politically domestic* to England: and again, the same towns, when reconquered or relinquished to France, *became domestic to France*, and *foreign to England*. Calvin's Case, 7 Co. 21.

Our own country presents us with another illustration of the same character, which occurred during our last war with Great Britain. The port of *Castine* was a *domestic* port of the United States: but it was seized by the British arms in September 1814, and retained under that allegiance from that time till the treaty of peace in 1815. This court has decided that while it was in the actual allegiance of Great Britain, it was a *foreign port*. It was restored under the treaty of peace, and again became a *domestic port*. The United States *vs.* Rice, 4 Wheaton, 314. The same question came under the consideration of the judge of the first circuit, in the case of the United States *vs.* Hayward, 2 Gal. 501, 2, in which *Castine* was in like manner held to be, for the time, *a foreign port, because* a port *extra ligeantiam reipublicæ*. The judge, in pronouncing the opinion of the court in that case, following the principles laid down by Sir William Scott in the case of the Foltina, 1 Dodson, 451, says, that "the allegiance to Great Britain was temporary, and the possession not that fair possession which gives to the conqueror *plenum et utile dominium*, the complete and perfect ownership of property. *It could only be, by a renunciation in a treaty of peace*, or by *possession so long and permanent* as should afford conclusive proof that the territory was altogether abandoned by its sovereign, or had been irretrievably subdued, that it could be considered as incorporated into the dominions of the British sovereign." On this view of the subject, he did not consider Castine as *absolutely* within the dominions of the British sovereign and incorporated into his realm; though he did consider it "a *foreign port, pro hoc vice. But*

had the possession been relinquished to his Britannic majesty by a treaty of peace, or *had his possession been so long and permanent* as to afford satisfactory evidence of its relinquishment to him, *then* it would have become *a foreign port absolutely*, and *have been incorporated with the British realm:* yet would its geographical position have been precisely the same as when it was *a domestic port of the United States.*" Now the circumstances, which the judge of the first district held would have been sufficient to have stamped *a permanent foreign character* on *Castine*, exist, in far fuller force, with regard to the Cherokee territory: for this *never* has been in the possession of the United States, nor of the states individually, nor of the British government under whom we claim. The *exclusive possession* has been, *from time immemorial*, in the Cherokee nation, and *their title has been acknowledged again and again, by treaties of peace and treaties of amity and cession.*

It is not *geographical situation*, therefore, but *political situation* which is to determine the question of *foreign state or not*, under the judicial clause of the constitution which we are now considering.

"But they lie within the chartered limits of Georgia." This is the argument which is supposed to dislodge them from all their pretensions to the character of *a state*, and, *a fortiori*, of *a foreign state.* The court will perceive that this is, under an immaterial change of terms, the only objection which we have just been considering; for if their lying within the territorial limits of the United States does not affect the question of their being a foreign state, their lying within the territorial limits of the state of Georgia can no more affect that question.

"They lie within the chartered limits of Georgia?" They lie exactly where they have lain for a time long antecedent to the existence of that state, and very probably, long antecedent to the existence of the monarchy from which that state derives its charter. They have owned that country from time immemorial: whereas, the charter which gave being to the state of Georgia is not yet an hundred years old. Where have these chartered limits been during all the time that these treaties have been negotiating; in which Georgia as one of the

parties has been constantly acknowledging that the territory belongs to the Cherokees, and is under their sole and exclusive jurisdiction? These chartered limits had certainly as much vigour and magic about them when they were first prescribed, as they have at this day. How does it happen that they have never been until now considered by the British monarch who gave the charter, by his subjects who took it, nor even by the state of Georgia who succeeded to it, as affecting the rights of the Cherokees?

The Cherokees were no parties to that charter. As to them, it was *res inter alios acta.* What right had the king of England to grant to his subjects the lands which the common father of the human family had previously assigned to their people? Was it the right of *discovery?* But in what chapter of the law of nations shall we find any such right recognized with regard to a country which was previously inhabited. The first discoverer of a *desert island* or *country* may acquire a right to take possession of it, on the principle of treasure found of which there is no prior owner. But no such right is acquired as to a country which is previously possessed by another nation.

I am aware of the question to which the discovery of this western world has given rise among the writers on the law of nations. We are all aware of the monstrous pretensions of Pope Alexander, in affecting to divide a great part of the world between the crowns of Castille and Portugal. The absurdity of this pretension has been justly exposed by all the writers of any authority on this subject: while the same writers have given a colour to the usurpations practised in this hemisphere which philosophy and religion must equally condemn.

Vattel, one of the most humane among these writers, has given a colour to the transaction which is not founded in fact. "The whole earth," he says, "is appointed for the nourishment of its inhabitants, but it would be incapable of doing it, was it uncultivated. Every nation is then obliged by the law of nature to cultivate the ground that has fallen to its share." After noticing the ancient Germans and modern Tartars, he adds, "there are others who, to avoid agriculture, would live only by hunting and their flocks. This might

doubtless be allowed to the first ages of the world when the earth, without cultivation, produced more than was sufficient to feed its few inhabitants. But, at present, when the human race is so greatly multiplied, it could not subsist if all nations resolved to live in that manner. Those who still retain this idle life, usurp more extensive territories than they would have occasion for were they to use honest labour, and have, therefore, no reason to complain if other nations more laborious *and too closely confined* come to possess a part. Thus, *though the conquest of the civilized empires of Peru and Mexico were a notorious usurpation*, the establishment of many colonies on the continent of North America may, *on their confining themselves within bounds*, be extremely lawful. The people of these vast countries rather overran than inhabited them." Vat. B. 1, c. 8, § 81.

Again, he says (B. 1, c. 18, § 209), "there is another celebrated question to which the discovery of the new world has principally given rise. It is asked if a nation may lawfully take possession of a part of a vast country, in which there are found none but *erratic* nations, incapable by the smallness of their numbers to people the whole? We have already observed (§ 81), in establishing the obligation to cultivate the earth, that these nations cannot exclusively appropriate to themselves *more lands than they have occasion for*, and which they are now unable to settle and cultivate. *Their removing their habitations through these immense regions* cannot be taken for a true and legal possession, and the people of Europe, *too closely pent up*, finding land of which these nations are in no particular want, and of which they make no actual or constant use, may lawfully possess it, and establish colonies there. We have already said, that the earth belongs to the human race in general, and was designed to furnish it with subsistence: if each nation had resolved from the beginning to appropriate to itself a vast country, that the people might live only by hunting, fishing and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. People have not then deviated from the views of nature *in confining the Indians within narrow limits.* However, we cannot help praising the moderation of the English puritans who settled first in New England, who, notwithstanding their being

furnished with a charter from their sovereign, purchased of the Indians the lands they resolved to cultivate. This laudable example was followed by Mr William Penn, who planted the colony of Quakers in Pennsylvania."

These passages have furnished an argument elsewhere, in favour of the claim set up by Georgia to the lands of the Indians. Let us see to what they amount. In the first place, it is very clear that the author does not put the European right to take possession of this country on the ground of *discovery*, as against the natives, but on an entirely different ground. His position is, that the earth was given to the human family for the common subsistence of the whole race of men, and that it is the duty of all so to use it as to make it capable of supporting the greatest possible number of human beings; which, he says, can be effected only by agriculture. From this principle, he deduces the conclusion, that when, by an over crowded population, the capacity for subsistence is exhausted in Europe, the people of that country, extruded from it by excess of numbers, have a natural right to seek some other part of the world where the land is more abundant and the people few, or where the roving and hunter habits of the natives leaves the earth to be cultivated by those who are willing to do it. Without stopping to question the soundness of this *great agrarian law of nations*, or remarking on the consequences to which it would lead among the different powers of Europe themselves; let us admit, for the sake of argument, the correctness of the principle, and see how far it justifies the original intrusion of the Europeans into this continent, or affects the question now before the court.

The law stated by Vattel is the law of necessity. The people of Europe, *too closely thronged and pent up* to be able to draw a subsistence from the earth there, have a natural right to avoid death by famine by seeking to draw that subsistence from the earth here, where the natives had more land than they wanted: and this is the justification offered by Vattel for the establishment of European colonies in North America.

But is this the principle on which, *in point of fact*, they were established? Was it the too dense population of Spain and Portugal, which stimulated Columbus to his voyages of

discovery, or which incited the powers of Europe to rival him in his wealth? Was it the over crowded population of England which led Sir Walter Raleigh to his voyages on the coast of Virginia and Carolina; and finally led to the establishment of the southern colonies? We know it was not: but that it was the same *auri sacra fames* which actuated Spain and Portugal; and which is at work at the present moment. Was it the want of animal subsistence which peopled New England with Puritans? We know it was not: but that it was for conscience sake alone they sought the freedom of these wilds. Was it animal necessity that settled Pennsylvania with Quakers? We know it was not: but that it was for the free enjoyment and diffusion of the religion of peace that they made that portion of the desert smile. Had this agrarian principle, for which Vattel contends, been carried throughout England, Scotland and Ireland, and the continent of Europe (since it is as justly applicable to individuals as to nations), there could and would have been no necessity to seek a subsistence in any other part of the world. No one colony can, with any colour of historical truth, be said to have been settled on the principle on which alone Vattel seeks to defend it.

But suppose (*argumenti gratia*) this necessity to have existed, how far could it have carried us according to Vattel's own principles? So far only as to have accommodated here that part of the starving population of Europe which had been pressed out by its redundance. For the same author, in the chapter just quoted (Sect. 208), in considering the right of a nation to take possession of an uninhabited country, limits that right *to such an extent as it can actually people and cultivate.* But were the charters of these colonies granted on this principle? On the contrary, they extended from the Atlantic to the Pacific Ocean, covering an *area* that would have sustained, by cultivation, the whole population of Europe. The charter of Georgia was of this description. It stretched originally from the mouths of the Savannah and Alatamaha to the Pacific ocean. Was this immense extent of country necessary for the support of the starving poor of the British dominions; especially after the other vast grants which had been made to other colonies? Was Great Britain in a condition, with the aid even of her whole population, to settle and cul-

tivate with her subjects, these almost boundless territories which she professed to have granted, or even the hundredth part of them?

Let us step from the original settlement to the present moment. Is Georgia now in such a condition to settle and cultivate the land to which she has an *indisputable title*, that she must seek to grasp more; and eject the Cherokees from the lands which have been guarantied to them by the United States? We know that she is in no such condition,—under no such necessity. It is not then by the law of nations that she can vindicate either her original charter on her construction of it; or her present pretensions.

But let us look to the other side. The author whom we have been considering countenances this claim, of which he treats, only as against the Indian tribes *in the hunter state;* as to whom he says, the necessitous emigrants from over peopled Europe have a right to confine those *roving tribes "within narrower limits:"* not to *extirpate them, or even to expel them;* but merely to confine *these hunters within narrower limits.* But this is no longer the condition of the Cherokees. They are hunters no longer. They are doing what Vattel says it is the duty of all nations to do, to draw upon the earth, by cultivation, for the support of life, and thus to contribute to the greatest possible multiplication of the human family; and they have now no more land than they want. The principles, then, which he advances as to *roving tribes* in the *hunter state*, have no longer any application to the Cherokees; and even if they had, they would not justify their extirpation.

But farther: these people are connected with us by a series of solemn treaties, by which they hold their land under the repeated and now perpetual guarantee of the United States. Is it to a people in this condition that Vattel applies the passages which we have been considering? Has he any where maintained that the faith of treaties may be violated towards such a people? We have seen the reverse.

There is nothing, then, on the one side or the other, in the original necessities of England or in the present necessities of Georgia, or in the actual situation of the Cherokee nation, which gives these passages from Vattel the slightest application to the case.

We have seen that the alleged right by *discovery* has no place in the law of nations, except with regard to uninhabited and desert places. With regard to such places, against whom is the right asserted? Necessarily against subsequent discoverers only. In relation to inhabited countries, even though the inhabitants be in the hunter state, this right by discovery has no plea, except with regard to the starving superflux shaken off by the too crowded population of the old world; and then only according to the measure of their actual necessities. If the sovereigns of Europe have asserted a larger right by discovery to this western world, that right is not to be found in the natural law of nations: if it belong to the conventional branch of that law, it binds those only who are parties to such conventions. Vattel, Preliminary Rem. § 24. I know that in the case of Johnson and M'Intosh, 8 Wheaton, 598, 9, this court has said, that it is not for the courts of the country which asserts this kind of title, to dispute it. But since the title is not to be found in the law of nations; has no foundation in natural justice; and exists only *in the assertions of the monarchs* of Europe, the courts of the country will not extend it *beyond their assertion*. Let us see, then, the title which has been asserted.

The English monarch asserted the right to grant the charters which he did grant. Did he assert thereby a right to exclude the original inhabitants from their possessions, or to interfere with their self government? This is the right which Georgia professes to derive from her charter. Does her charter convey it? Is such the proper construction of that instrument? The charter is now precisely what it was before our revolutionary war, while it was held by British subjects. Georgia claims to have succeeded by the revolution to *their rights*, and only to *their rights*. If the right of the Cherokees to hold and govern their territory be incompatible with that charter now, it has always been incompatible with it. But was such a principle ever *asserted* either by the British monarchs or by their grantees. Contemporaneous, long settled, and uniform exposition has always been held conclusive in such a case: and this exposition will conduct us to a conclusion directly at war with the pretensions of Georgia.

The British monarch carried his pretended right of discovery

to the utmost extent to which this honourable court will follow it. He *asserted* that right *against all other discoverers.* He excluded them from acquiring lands in this quarter by treaties of concession from the Indian sections. He insisted on monopolizing the market: but he *asserted* this monopoly *only against other foreign nations.* Against the *Indians themselves,* he *asserted* no other title than that of a right to *purchase* such parts of their lands as they chose voluntarily to cede. He *asserted* no right to *drive them* from their lands *by force,* nor *to interfere with their self government; he* could, therefore, have intended to convey no such right by his charter; nor has it ever been pretended, until recently, that the charter comprised any such power. The British monarch never claimed the Indians as his subjects. He never claimed their allegiance. He never interfered with their self government. He always regarded them as a separate people; and *treated* with them as a *sovereign* people, who were at perfect liberty to cede or to retain their lands, as they pleased.

A brief reference to the operations of the British colonists, under this charter, will place this subject in a light too clear to be mistaken.

The first company who crossed the Atlantic, under this charter, arrived at the present site of Savannah under General Oglethorpe, in 1733. According to the present claim of Georgia, all the lands within the limits of that charter belonged to these colonists; and they had nothing more to do than to take the possession and to claim the allegiance of the Indians as a conquered people, and a part of the subjects of his Britannic majesty. Had any such arrogant pretension been set up, *this conquered people,* the lords of the forest, could, and probably would have crushed the puny colony with as much ease as they could have crushed the serpents' eggs around them. But general Oglethorpe understood the charter as his sovereign understood it. "*A treaty* was held with the *Creek Indians, to whom the lands were admitted to belong, and the cession of a considerable tract was obtained from them.*" 1 Marshall's Life of Washington, 226.

Will it be said that this was the effect of weakness and the want of ability on the part of the colonists to assert their rights? How does this comport with the idea that the Indians were a

conquered people? But it was not the effect of weakness. It was the effect of principle. It flowed from the universal understanding that the land belonged to the Indians, and could be rightfully obtained from them only by voluntary cession. We have the proof of this by another treaty made by the officers of his Britannic majesty with the Cherokee and Creek nations of Indians, in 1773, just before the commencement of our revolutionary war; at a time when the colonists were in sufficient force to have asserted these alleged rights against the Indians, if they had been supposed to exist. This is the treaty of Augusta, to be found in Crawford and Marbury's edition of the Laws of Georgia (Appendix, page 600). Your honours will observe that this was the *purchase of another cession* of the Indian lands. You will observe the solicitude of the British commissioners to protect themselves against the imputation of force or fraud, by the solemn and emphatic assertion and reiteration of the fact, that this treaty was made *at the earnest solicitation of the Indians themselves, who were anxious to raise a fund for the payment of their debts to their traders.* And you will observe, what is quite as much to our purpose, the striking manner in which *the Indians* are contradistinguished from the *subjects of his Britannic majesty,* as we have seen they have since ever been from *the citizens of the United States.*

[Here Mr Wirt read the preamble and provisions of the treaty.]

How can we reconcile this treaty with the position that the charter, by its own proper vigour, had before transformed those Indians into subjects of the British king, and made their lands the property of the British crown? Again. The state of Georgia joined the confederation of the United States in 1778. In the year 1783, that state herself made a treaty with the Cherokee Indians, in which their title is admitted, and the Cherokees are again contradistinguished from *the inhabitants of Georgia,* as they had been before from *the subjects of the British king.* Then follow immediately the treaties of Hopewell, Holston, and others, down to the present time, which we have already considered: and your honours will thus perceive, that from the date of the charter of Georgia to this day, under every change of government, it has never been considered as

affecting the Indian possession and right of self government within their unceded territory.

The state of Georgia considers her charter as an *absolute and immediate grant* of the *present right of possession* and *present right of jurisdiction, over all the lands within the limits of that charter.* It is upon this construction of it alone that she defends her present course. But is this the true construction of it, with regard to the native Indians? The charter must receive a construction *according to the title,* and the *intention of the grantor.* But the court, finding no foundation for his title in the law of nature or nations as applied to the facts of the case, have said that they must respect the title *as alleged and maintained by the government to which they belong,* and *by the antecedent government under whom we claim.*

Try the charter by this title, and the pretension of Georgia is at an end; for neither the British king who gave the charter, nor the colony which received it, ever pretended to regard it as an *absolute and immediate grant* of the *present right of possession* and *the present right of jurisdiction, over all the lands within the limits of that charter.* The state of Georgia did not so regard it, when she made her treaty with the Indians in 1783. She did not so regard it when, as a component part of the United States, she made her treaty of Hopewell in 1785; her treaty of Holston in 1791: and all the subsequent treaties down to the present time. She did not so regard it when, in the year 1802, she ceded her back lands to the United States, on the express condition that the United States should *extinguish, as soon as it could be done peaceably and on reasonable terms,* the *Indian title to all the lands within her remaining limits:* thus, clearly, admitting the subsistence of the India title, until it should be extinguished, peaceably and on reasonable terms, by a voluntary cession from the Indians themselves.

The United States, the government to which this court immediately belongs, have never considered the charter of Georgia as an *absolute* and *immediate grant to that state, of the present right of possession,* and *the present right of jurisdiction, over all the lands within the limits of that charter.* The whole body of our treaties

disprove it. They admit on the contrary the present right of possession, and the present right of self government by the Indians; and the continued subsistence of those rights in them, until they shall be voluntarily relinquished. They not only admit the Indian right of possession, but they have solemnly pledged the faith and honour of the United States to guaranty it by force of arms. Thus, the *executive* of Great Britain, the *executive* of the state of Georgia, and the *executive* of the United States have all concurred in disaffirming the construction now placed by Georgia upon her charter; and in affirming the adverse right of possession and jurisdiction of the Indians.

The *legislative branch of the government of Georgia* did the same thing by their cession to the United States in 1802.

The *legislative branch* of the government of the United States have continually done the same thing. All the laws of congress for regulating the intercourse with the Indian tribes, from the year 1790 down to this day, have done the same, and take exactly the ground of the treaties which we have been considering. The intercourse act of 1802 unites all the provisions and deserves particular notice.

The act is entitled "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontier." 2 Story's Laws U. S. p. 838.

It begins with a description of the boundary between the United States and the Indian tribes, and provides "that if *the boundary between the said Indian tribes and the United States* shall at any time hereafter be varied by any treaty, which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act shall be construed to apply to the line so to be varied, &c." This line is here called the boundary *between the Indian tribes* and *the United States*, thus not considering the Indian tribes as *not within the United States*, in the political view of the subject, in that view in which the states of the union are within the United States. But the laws of Georgia have beaten down the treaty boundary; have in fact annihilated it; and declared these Indians to be within the state of Georgia, and the lands they occupy to be part of the ungranted lands of that state.

The second section of the act makes it penal in a citizen, or other person resident within the United States, to cross over or go within that boundary to hunt or otherwise destroy the game, or to drive or carry stock to range on those lands. The state of Georgia has by her late laws repealed and annulled this provision of a law of the United States, and authorised her citizens to cross the boundary, not only to hunt the game, but to hunt the Indians themselves, to arrest, imprison and even to execute them.

The third section makes it penal for any such citizen to go into the Indian country without a passport. This also the state of Georgia has annulled.

The fourth section recognizes the Indian territory to be not within the jurisdiction of the states, very nearly in the words of the eleventh article of the treaty of Holston. It is in these words:

"If any such citizen or other person shall go into *any town, settlement, or territory belonging, or secured, by treaty with the United States, to any nation or tribe of Indians*, and shall there commit robbery, larceny, trespass, or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, *if committed within the jurisdiction of any state, against a citizen of the United States:* or unauthorised by law, and with a hostile intention, shall be found on any *Indian land*, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed: and if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short shall be paid out of the treasury of the United States, &c."

Here is an express acknowledgement that all towns, settlements, and territories acknowledged by the treaties of the United States *to belong to the Indians*, do in fact belong to them, and are *not within the jurisdiction of any state.* The towns, settlements, and territories of the Cherokees are acknowledged by the treaty of Holston to belong to them: they

are consequently here, as well as in the treaty of Holston, admitted to be *not within the jurisdiction of any state:* but the state of Georgia, placing herself in direct opposition both to this law and to the treaty, declares that the Cherokee territory is within her jurisdiction; and she has seized upon that territory and its jurisdiction in defiance of the treaties, laws, and constitution of the United States.

By the fifth section of the act it is provided, "that if any such citizen or other person shall *make a settlement* on any lands *belonging, secured,* or *granted, by treaty with the United States, to any Indian tribe,* or *shall survey, or attempt to survey such lands, or designate any of the boundaries by marking trees, or otherwise, such offender shall forfeit a sum not exceeding one thousand dollars,* and suffer imprisonment not exceeding twelve months. And it shall, moreover, be lawful for the president of the United States to take such measures, and employ such military force, as he may judge necessary, to remove, from lands *belonging* or *secured by treaty* as aforesaid to any Indian tribe, any such citizen or other person, who has made, or shall hereafter make or attempt to make a settlement thereon."

Here is a law made by congress under the authority of the constitution of the United States, which gives to congress the exclusive power of regulating intercourse with the Indian tribes, made in strict conformity with our public treaties with those tribes, forbidding certain things to be done under heavy penalties and authorizing the president to prevent them by the employment of the military force of the United States; and it is but to refer to the laws of Georgia annexed to the bill to see that the things thus forbidden, and which the president is required to prevent, are the very things which that state has authorized and required to be done by her officers. The authority given to the president to prevent these things is a command, according to all the constructions of such a law; yet, according to the bill, that officer has said that he has no power to interfere with the laws of Georgia. There can be no doubt, therefore, that Georgia will do what this law as well as our public treaties has forbidden, unless prevented by the authority of this honourable court.

It is needless to detain the court with a further examination

in detail of the several provisions of this law. It contains twenty-two sections, and there is not one of them which does not disaffirm the construction given by the state of Georgia to her charter, by admitting the exclusive right of possession by the Indians within their boundaries, and their sovereign right of self government within their own territory.

Having thus seen the views which have been always hitherto taken of this subject, both by the *executive* and *legislative* branches of the government of the United States, let us now turn to the *judicial* branch.

In the case of Fletcher and Peck, 6 Cranch 142, 2 Peters's Cond. Rep. 208, the court had not occasion to analyze, severely, the character of the Indian title. The opinion concludes with these words: "the majority of the court is of opinion, that the nature of the Indian title, *which is certainly to be respected by all courts until it be legitimately extinguished,* is not such as to be *absolutely* repugnant to *seisin in fee* on the part of the state." Mr Justice Johnson dissented from this opinion. He denies that the state of Georgia has a *seisin in fee* in the Indian lands. "To me it appears, he says, that the interest of Georgia in that land amounted to nothing more than *a mere possibility*, and that her conveyance thereof could operate only as a covenant to convey or to stand seised to a use." In a subsequent part of the opinion, he says, in speaking of the tribes to the west of Georgia, of whom the Cherokees are one, "we legislate upon the conduct of strangers or citizens within their limits, but *innumerable treaties formed with them acknowledge them to be an independent people; and the uniform practice of acknowledging their right of soil, by purchasing from them and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil.* Can then *one nation* be said to be seised of a fee simple in lands, *the right of soil of which is in another nation?* It is awkward to apply the technical idea of a fee simple in lands *to the interests of a nation, but I must consider an absolute right of soil, as an estate to them and their heirs.*"

In this case, then, we have a majority of the court admitting that the Indian title was to be respected by all courts until it should be legitimately extinguished; and we have the other

judge declaring that *innumerable treaties* acknowledge these people to be *an independent people, a nation possessed of an absolute right in the soil to themselves and their heirs,* and *of the sovereign right of governing themselves within their own territory.*

But it was in the case of M'Intosh and Johnson, 8 Wheaton, 573, that the court were called upon to make a more profound and careful investigation of the character of the Indian title. The immediate question in that case was whether a grant made by Indian tribes or nations, north west of the Ohio, to private individuals, was a valid grant, and could be successfully asserted against the United States, to whom the same Indian tribe had subsequently ceded the same lands. It was in this case that the court entered upon the examination of the *title by discovery* as understood among the potentates of Europe. "On the discovery of this immense continent," say the court, "the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprize of all; and the character and religion of its inhabitants afforded *an apology* for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty *in convincing themselves* that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and christianity in exchange for *unlimited independence.* But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, *should be regulated as between themselves.* This principle was, that *discovery* gave title to the government by whose subjects or by whose authority it was made, *against all other European governments,* which title might be consummated by possession.

"The exclusion of *all other Europeans* necessarily gave to the nation making the discovery *the sole right of acquiring the soil from the natives, and establishing settlements upon it.* It was a right with which *no Europeans* could interfere.

It was a right which all asserted for themselves, and to the assertion of which by others, all assented.

"*Those relations which were to exist between the discoverers and the natives were to be regulated by themselves.* The rights thus acquired being exclusive, no other power could interpose between them.

"In the establishment of these relations, the rights of the original inhabitants were in no instance disregarded, but were necessarily to a considerable extent impaired. *They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion:* but their rights to *complete* sovereignty, as independent nations, were necessarily *diminished;* and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that *discovery* gave exclusive title to those who made it.

"While the different nations of Europe respected the right of the natives as occupants, they asserted the *ultimate dominion* to be in themselves; and claimed and exercised as a consequence of the *ultimate dominion* a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, *subject only to the Indian right of occupancy.*

"The history of America from its discovery to the present day proves, we think, the universal recognition of these principles."

The court then proceeded to an examination of this history.

We have here the whole front and extent of *this title by discovery:* and to what does it amount? To this only; that the first European discoverer of any part of this continent had the exclusive right *to become the purchaser of the soil from the natives to whom it was admitted to belong.* Not to take it from them by force; not to compel them to sell it: for, "*they were admitted,* say the court, to be *the rightful occupants of the soil,* with a *legal as well as just claim to retain the possession of it, and to use it according to their own discretion.*" Although they are here called *occupants,* it was not a *permissive occupancy, at the pleasure of the discoverer:* it was not a *temporary occupancy, to be determined*

at his pleasure: it was a *rightful occupancy*, with *a legal as well as just claim to retain the possession of it, and to use it according to their own discretion so long as they should think proper to retain it.* In the language of judge Johnson, in the case of Fletcher and Peck, *it was an estate to them and their heirs, to be determined only at their own pleasure.*

Nor were they, according to this opinion of the court in the case of M'Intosh and Johnson, limited to the mere right of *hunting* upon the land; on the contrary, they had a *legal* as well as *a just right to use it according to their own discretion, so long as they should think proper to retain it:* they had then a *legal and just right to fell the timber, to clear and cultivate the land, to build upon and improve it, to dig for ore; in short to exercise every act of complete ownership over it, so long as they should choose to retain the possession.* If they thought proper thus to retain and use it, *for ever*, to them and their heirs; they had *a legal and just right* to do so. The discoverer claimed no right to interfere with the possession or use it *until it should be voluntarily ceded to him by the natives.* His assertion of right was only against other Europeans. He would not suffer *them to purchase of the natives.* He claimed *the right of purchase* exclusively for himself. Hence he called himself the proprietor of the *ultimate domain.* But this *ultimate domain* gave him no right to disturb *the Indian possession and enjoyment. His was a domain which might never come into actual fruition.* For the Indians were not to be *constrained* to sell. No actual or moral force was to be applied to *constrain* them to that conclusion. For as they had *a legal as well as a just right to retain the possession as long as they pleased, and to use the land according to their own discretion;* it would have been *as illegal and unjust* to place them under any *moral coercion to sell by disturbing and annoying them in the enjoyment,* as to wrest it from them by force.

Such was the title by discovery asserted by the British monarch, under whom Georgia claims her charter. By virtue of this *ultimate domain* which has been described, he claimed the right to grant the land, *while yet in the Indian occupancy.* He did grant this portion of it by charter to the

Georgia company. What title did they take by that charter? The court answer the question in the passage which has been quoted: they took a title *subject to the Indian occupancy:* that is to say, according to the explanation given of this occupancy by the court, *subject to the legal and just claim of the Indians to retain the possession as long as they pleased, and to use the land according to their own discretion.* How does this comport with the construction now for the first time placed by Georgia on her charter, and with the laws, annexed to the bill, which she has passed under that construction?

In adverting to this exclusive claim of the discovering potentate to purchase their land from the natives whenever they should be disposed to sell, and the consequent invalidity of a sale made by them to private individuals; the court say, farther, "their rights (those of the natives) to *complete sovereignty* as *independent nations* were *diminished,* and their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle, that discovery gave exclusive title to them who made it:" that is, exclusive title to acquire the lands from the natives, because their legal and just claim to retain the land as long as they pleased had just been admitted. But their rights to complete sovereignty as independent nations were diminished in no other particular, than by that tacit convention established among the potentates of Europe, that they would not interfere with each other's discoveries, but leave to the discoverer the exclusive right to purchase of the natives within the bounds of his discovery. They could not sell to others, because all others had agreed to forbear to purchase. Did this conspiracy of the monarchs of Europe, to throw into each other's hands the exclusive market in Indian lands, divest these natives of the political character of *states and sovereign states,* in the estimate of the law of nations? We see that it did not, *if they retained the right to govern themselves by their own laws within their own territory, with the right of making legitimate war even upon these discoverers themselves:* and these rights we have further seen that they did retain.

There is another passage in the opinion of the court in the case of Johnson and M'Intosh that demands attention (p. 592, 593). "Another view has been taken of this question which

deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or in other words might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, *still it is a part of their territory and is held under them by a title dependent on their laws. The grant derives its efficacy from their will: and if they choose to resume it and make a different disposition of their land, the courts of the United States cannot interpose for the protection of the title. The person, who purchases lands from the Indians within their territory, incorporates himself with them, so far as respects the property purchased; holds their title, under their protection, and subject to their laws.* If *they* annul the grant, *we know of no tribunal which can revise and set aside the proceeding.* We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty."

This view of the subject is in strict consonance with all our treaties with the Cherokee nation. It contemplates the territory as *their territory* so long as they shall choose to retain it; and so long also under the exclusive government of *their own laws*, without any power of revision or reversal in any other tribunal.

Thus, we see, that the construction which Georgia now places on her charter, to wit, that it gives her a right to take *immediate possession of the land within the limits of that charter*, and *to govern it and all its inhabitants by her laws*, in total disregard of the Indian title and Indian jurisdiction, is a construction directly repugnant to the title asserted by the monarch who gave that charter; at war with the practical construction uniformly placed by him and his grantees on that charter; at war with the construction placed by Georgia herself on that charter in her treaty of 1780 with these Indians, and in her act of cession to the United States in 1802; and in open and direct war with all the acts of every branch of our government, *executive*, *legislative*, and *judicial*, down to the present day; which have uniformly admitted the *territory and*

its exclusive jurisdiction to belong to the Indians so long as it shall be their pleasure to retain it.

The political paradox, therefore, which Georgia supposes to be asserted against her, when we deny her a right to the *immediate and exclusive possession and jurisdiction over all the lands within the limits of her charter*, becomes a paradox only by her own voluntary misconstruction of that instrument. Her charter gives her, and has ever, heretofore, been considered as giving her *only* the *ultimate domain* over the lands in the Indian occupancy, *to take effect when they shall choose to cede them:* but she chooses to confound the *ultimate domain* with *the immediate possession*, and thus to create a paradox where none, in reality, exists. It is a paradox erected by the impatience of cupidity, not by the light of truth and justice. She chooses to consider a *future contingent* title, as *a present, absolute* one, a *mere possibility, as a certainty:* and boldly assuming this novel construction as an obvious truth, she proceeds to act upon it, in entire and open disregard of all the treaties, as well as the laws and constitution of the United States, to which she is herself a party. Shall then these things be permitted, and does there exist no power in any branch of our government to arrest this fatal madness, and to save the faith and honour of our nation? Then we have no nation. Our constitution, laws, and treaties are empty pageants, that but mock us with a show of national existence. And it were well for us if we could persuade the world of this fact; for better, far better would it be for us to be no nation, than to be a nation without faith and honour. But let us hope for better things. We trust that there is a redeeming spirit here that will save us from this humiliation: this indelible disgrace.

We trust we have shown that the state of Georgia, her chartered limits notwithstanding, has no right to the *present possession* of the Cherokee territory. If so, they are not *her subjects*, but *aliens to her government* and *are not bound by her laws.* Even in the far stronger case of *a present title* to a country, *the possession of which is in another nation, which claims and enjoys the actual allegiance of the people,* these people are *aliens* to the prince that has the title. So it was held in Calvin's case, 7 Co. 21. France was claimed by

England as having descended to Edward III. from his mother Isabel, daughter and heir to Philip le Beau, king of France. On this plea France was invaded; and Henry VI. was, at one time, in possession of "the heart and greatest part" of that kingdom, having been crowned king of France at Paris. On this state of facts, it was held, that those who were born in the parts of France that were under *the actual allegiance* of Henry, "were no aliens, but capable of and inheritable to lands in England;" while those who were born in the other parts of France, *though the title was the same to the whole kingdom*, were held to be aliens. To constitute a man a subject, the country in which he is born should be in *actual obedience* to the sovereign whose subject he is asserted to be. "It is termed *actual obedience*, says Coke, page 18, because though the king of England has *absolute right* to other kingdoms or dominions, as France, Aquitain, Normandy, &c. *yet seeing the king is not in actual possession thereof, none born there since the crown of England was not of actual possession thereof, are subjects to the king of England.*"

Now the state of Georgia never had *possession*, nor *right of possession* to the Cherokee territory; this has been shown, as it has been that the possession which she has recently taken is without colour of law, and in direct violation of our treaties and the solemn guarantee of the United States: it is, therefore, as no possession in contemplation of law. These people, then, are aliens to her government; and consequently owe no allegiance to her laws.

They are not under the protection of the state of Georgia. By the second article of the treaty of Holston, they placed themselves under the protection of the United States, *and of no other sovereign whatsoever*, and stipulated that they would hold no treaty *with any state*. They are not connected with that state, then, either by allegiance or protection: and when Georgia presents her paradox of a *foreign state within the limits of her charter*, she meets another paradox much more enigmatical, of a body of six thousand people, permanently and rightfully within those limits, who owe her no allegiance and are entitled to no protection from her. In truth, there is no paradox in the case: the apparent paradox proceeding entirely from her erroneous construction of her charter; in confounding

the *ultimate domain* which it *does* give her, with a *present absolute title*, dominion which it *does not* give her.

To the same error is to be traced the trite objection that the right of self government, claimed by the Cherokees within the chartered limits of Georgia, is the claim of an *imperium in imperio.* Half enlightened persons, who see men only as trees walking, seem to consider this as an unanswerable objection: for no other reason that I can imagine, than that it is expressed in a foreign and learned language which they do not understand; and that men always fancy there is something unfathomably deep in what lies beyond the reach of their own lead. Those, who understand the objection in its true meaning, see that it has no manner of application to the case. *A government* within *a government* does not mean *a state* surrounded *by the territories of another state*, and *yet retaining its separate political character:* for in this there is nothing more incongruous than in the every day's occurrence of a small land-holder having his estate surrounded by the lands of his more wealthy neighbour, and yet retaining his separate independence and sovereign right of property. If this were the meaning of the objection, the free Hanse towns of Germany would be so many *imperia in imperio,* because surrounded by the territory of the German princes, within whose districts or circles they lie: the district of Columbia would be an *imperium in imperio,* because it lies within the chartered limits of Maryland and Virginia; and Castine was an *imperium in imperio,* while the British held the possession, and gave the law within that port; because it lay within the territorial limits of the United States. The *imperium in imperio* has no application to two distinct governments operating at the same time *on separate territories;* for the one *government* is not *within the other government,* although the *territory* over which the one acts, may be *encircled by the larger territories* of the other. It is the conflict of *two sovereignties on the same territory at the same time,* that is meant by the *imperium in imperio.* Even in this sense, it is no longer a paradox in the United States, for every state exhibits an example of it. But *in this sense* it has no application to the state of Georgia and the Cherokee nation: for they are *separate sovereignties exerted over separate ter-*

ritories; and there is therefore no *imperium in imperio* in the case. It is true, that if the state of Georgia had *the present right of possession and jurisdiction* over the Cherokee territory, the self government of the latter nation on that territory, would present the incongruity of an *imperium in imperio.* But this is the question. If the British government, from which the charter flowed, and the American government, including the state of Georgia herself, in times past, are right in the construction of that charter, she has no such right of *present possession and jurisdiction* over the Cherokee territory; and it is only by assuming what is not true, that she has such *present right,* that she has been able to bewilder twilight intellects with this often repeated but wholly unfounded objection of an *imperium in imperio.* It has fared with this imaginary objection as it has often fared with imaginary facts, which are repeated and circulated until they are at length believed even by their inventors.

Upon the whole, may it please your honours; we are not aware of any test that can be fairly applied to the subject which will not conduct us to the same conclusion that the complainants are *a state* and *a foreign state* in the sense of the judicial branch of the constitution; which is manifestly a sense purely *political* and not at all *geographical.*

1. Is *allegiance* the test? Then are they a *foreign state;* for they owe no allegiance to any other government than their own.

2. Is recognition by treaty the test? Then are they a *foreign state;* for they have been so recognized by the government of the United States, from the treaty of Hopewell in 1785 down to the present day.

3. Is the right to hold the exclusive possession of their territory, and to give the supreme law upon it the test? Then are they a *foreign state;* for every branch of the government of the United States has concurred in according to them these rights.

4. Is the right to make legitimate war upon the United States the test? Then are they *a foreign state;* for all our treaties with them, and all our practice under those treaties, admit this right as unquestionable.

5. Is individual alienage the test? Then are they *a foreign*

state; for all our treaties, laws and constitution, admit that they are not citizens of the United States, and, if not citizens, they are necessarily aliens, there being no middle class recognized by our political institutions.

6. Is the language and reason of this constitutional provision the test? Then are they *a foreign state;* for by the language they are *a foreign state,* if *foreign* to our confederacy: and by the reason they are *a foreign state;* since standing upon a *national compact with the United States,* they have a right to the jurisdiction of the *national court* in the exposition of that contract.

7. Are civilization, religion, agriculture and a capacity for self government essential to the consummation of their character as *a foreign state?* Then are they *a foreign state;* for according to the allegations of the bill they are at least upon a *par* with their white neighbours in these respects, whose political existence as a state is not to be questioned.

Thus they unite in themselves every test which, according to the law of nations, is deemed essential to the constitution of *a foreign state.* If we look to the specific clause of the constitution under question, and construe it either by its letter or reason, we are conducted to the same conclusion that they are *a foreign state.* If we regard the test which has been heretofore presented by this court itself, *a recognition by our own government;* this too concurs in repeated and solemn acts, in affixing the same character to them, that of *a foreign state.*

On the other hand, if the objections to their being a *foreign state* be considered, we have seen that they proceed either from confounding the *geographical* with the *political* meaning of the words *foreign state;* or from erroneously considering a *partial dependence* on the United States as ***such a dependence as destroys their political existence as a separate state.***

For, 1. If the objection be that they lie within the *territorial limits* of Georgia, we have seen that they do not lie within the *territorial jurisdiction* of Georgia; and that although her chartered limits give her the *ultimate domain* they give her *no present dominion* and do not, in the slightest degree, affect the *present political condition* of the Cherokee nation.

2. If the objection be that the principle of discovery, as agreed upon by the potentates of Europe, leaves them only the *occupancy* of their lands; we answer that it is *a perpetual occupancy to them and their heirs:* for, in the language of this court, *they have a legal and a just right to retain their lands and to use them as they please: they have a right to give the law exclusively on these lands,* in the character of a separate state, and this *for ever;* and they have a right to make *legitimate* war for these lands, even upon the United States. With these decisive attributes of sovereignty, we cannot discover how this title by discovery, called *the ultimate domain, which they have a right to protect for ever,* can interfere with their *present political character* as a separate community or *state;* more especially since their present political character may be perpetuated by them, for ever, at their pleasure.

It is true that the potentates of Europe have agreed that one of them, alone, shall have the exclusive right of purchasing such of their lands as the Indians are disposed to sell; and consequently, when they are disposed to sell, they must sell to that potentate, or to those who have succeeded to his title. This title by discovery, however, places them under no necessity of selling, at all. It leaves them entirely free on that subject. So that this arrangement at last only effects the *value of the property* in their hands, by withdrawing all competition from the market, and limiting them, when disposed to sell, to a single purchaser. It is not perceived, however, that this arrangement affects the validity of their title to their property, any more than a similar corrupt combination among the purchasers at a private market affects the validity of the proprietor's title to his goods. He has only to say, if I cannot sell to whom I please, I will sell to none of you, but keep my property to myself.

Similar combinations have been made among other nations against some foreign prince or state; but however injurious as well as unjust they have been, they have never been considered as affecting the *political existence of the state* or prince who is the object of the combination. Great Britain depends upon her commerce, and consequently upon foreign markets, for the supply of her revenue. Foreign states have combined

not to trade with her, or to buy her goods, nor to permit others to do it; still this has not been considered as impairing her or their sovereignty as states. Our own rights, as a sovereign nation, have been restrained by foreign policy, and the freedom of our commerce disturbed by British orders in council and French decrees; yet this has never been considered as calling in question our sovereignty as a state. These were belligerent measures, it is true; but we were no parties to the war. The same sort of foreign interference has been exercised, in a time of profound peace, and from motives of selfish policy, as in the case before us. The holy alliance was founded entirely on the asserted right of such interference. The allied monarchs determined that no revolution should be permitted in any nation of Europe, however much the people should desire it, but that all the crowns of Europe should be kept in the line of legitimate succession. Here was a direct interference with the independence of all the nations of Europe, not parties to that alliance: and it was meant to be acted on, and has been acted on. Did those nations lose their present political existence as states, by force of that alliance?

Suppose that the United States and the European sovereigns, owning colonies in the West Indies, should agree that they would not accept from Spain a cession of the island of Cuba, or that one of them only should be at liberty to accept it, and that any cession of it made to others should be void; would this destroy the sovereignty of Spain in that island? Suppose that the powers of Europe should agree that no one of them should accept a cession of Belgium, except the king of Holland; would that destroy the present political sovereignty of Belgium? Suppose these potentates should resolve that Belgium should not elect a foreign king; this would certainly *diminish her complete sovereignty as an independent state;* but would she for this reason *cease to be a state*, and *a sovereign state*, too, in the view of the law of nations? Is it not enough to say that the potentates of Europe, and the claimants under them by succession, have *diminished, in some degree, the complete sovereignty* of the Indians, as *independent nations;* the question is, *have they diminished it to such a degree as to destroy their present political existence as states?* We see that they have not, because they have still recognized in them those

vital attributes which form the test of sovereignty in a state; the *exclusive right of self government in their own territory, and the rights of war and peace, even against the discovering potentate and his successors.*

3. Is the objection that they have acknowledged themselves under the protection of the United States? Vattel, we have seen, looks at this specific objection, and declares that it does not impair their sovereignty as a state; provided they retain the rights which we have shown they have retained.

4. Is the objection that they are a *domestic* state, because within territorial limits of the United States? But this is changing the idea of this clause of the constitution from a *political* to a *geographical* one. *We have no domestic states except the states of the union.* All other states, if they be states at all (as we have found the Cherokee nation to be), are, necessarily, *foreign states.*

The situation of the Indian nations on this continent, it is admitted, is anomalous in many respects: this anomaly is one of our own contrivance, not theirs. It will not do, however, among accurate reasoners, to assume these anomalies as stripping them of the character of foreign states. These anomalies are to be analyzed: and we must find in them something incompatible with that degree of sovereignty which will still leave these nations in the political condition of states, before we leap to the conclusion that they have ceased to be states. It has been my endeavour to perform this process of analysis. I have looked at all the anomalies that have been brought to my knowledge; and after allowing to them all their weight, it seems to me that whether we look for our standard to the law of nations, to our public treaties with these people, or to the acts and adjudications of the executive, legislative and judicial departments of our government, the Cherokee nation is a *foreign state* within the sense of that article of our constitution which is to decide this question.

There is, however, another article of the constitution which demands consideration; that which contains the enumeration of the powers of congress. Article 1, § 8. Among other powers here enumerated, there is this: congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes."

This may be relied on to prove that the Indian nations are not *foreign states* in the sense of those who framed the constitution; because the Indian tribes are here enumerated in contradistinction to *foreign nations.*

Let us consider this objection with care and with candour.

It has been already admitted and shown by authority that the word *foreign* has various significations, *political, geographical, chemical, metaphysical,* &c. and that to determine its sense in any given instance we are to look *at the subject matter* to which it is applied. In one sense, Webster says, "we call *every country foreign,* which is *not within the jurisdiction of our own government.*" This is its political sense. "*More generally,* he adds, *foreign* is applied to *countries more remote than an adjacent country,* as a *foreign market,* a *foreign prince.* In the United States, *all transatlantic countries are foreign.*" This is its *geographical* sense.

Now, in which of these senses is the word used in the clause under consideration? If in its *geographical or local sense,* it does not at all affect the question of the Cherokee nations being a *foreign state* under the judicial clause, as we have seen where a *foreign state* is presented in its *political sense.*

In the clause before us, the *subject matter* is the *regulation of commerce* between the *United States and other nations.* The regulation of *trade between different markets* presents us only with *geographical ideas,* with regard to those *markets* and the *locomotive means* by which it is carried on. *Commerce with foreign nations* gives us the popular idea of an *intercourse carried on by ships,* in which the articles of one nation are bartered and exchanged for those of the other. And in this connection "commerce *with foreign nations*" presents the word *foreign* in what Webster calls its *more general,* or popular sense, of *trade with nations beyond the Atlantic:* or at least with nations *extra-territorial to the United States; in point of location.* This being the popular, and, indeed, the correct meaning of *commerce* with *foreign nations,* the clause is perfectly correct and free from tautology; giving us the word *foreign* in its *geographical sense only,* without any allusion to that *political sense* in

which the phrase *foreign state* is presented in the judicial clause. Thus: "congress shall have power to regulate *commerce with foreign nations,*" means with nations *beyond the Atlantic,* or any where *beyond the territorial boundary* of the United States: "and among the several states" means among the states composing the union: "and with the Indian tribes" means with those Indian nations, which are not states of the union, and yet are *locally situated* within the exterior boundary line of the United States.

If the clause had stopped with giving congress the power "to regulate commerce *with foreign nations, and among the several states,*" it might well have been questioned whether they would have had power to regulate commerce with the Indian nations, within the limits of the United States, as settled by the treaty of peace with Great Britain: for it might with reason have been contended and adjudged, that *commerce with foreign nations* meant commerce with nations *foreign in point of location,* and *not foreign in point of jurisdiction.* Such a decision, however, would have left the question now before the court untouched; the question here being, whether the Cherokee nation be not a *foreign state in point of jurisdiction.*

With an intention to give to congress the exclusive power of regulating commerce with the Indian tribes, it would certainly have been extremely unwise to leave that power to rest on the construction that might be placed on the general expression of a power to regulate *commerce with foreign nations:* and this the more especially, after the controversy which had arisen between the state of Georgia and the old congress, on the analogous provision in the articles of confederation. The provision in the articles of confederation was, that "the United States in congress assembled shall have the sole and exclusive right and power of regulating the trade and managing all affairs with the Indian tribes *not members of any of the states; provided that the legislative right of any state within its own limits be not infringed or violated?*" We learn from the transactions of the old congress, to which my colleague has referred, that the state of Georgia considered herself still at liberty to treat individually with the Indian nations within her limits, a liberty which we have seen that

she exercised in her treaty with the Cherokee and Creek nations in 1783. Her authority to do this was questioned in congress; and you have been referred to an elaborate report made by a committee of that body, of which the learned Mr Dane was the chairman, in which her authority to treat with or to legislate over the Indians was most explicitly denied. This question, however, having thus arisen under these two members of this clause in the articles of confederation, which restrain the power of congress to Indians *not members of any state* (which the Federalist considers as *obscure and contradictory*), and to such an exercise of the power as shall not violate or infringe *the legislative right of any state within its own limits* (which the same eminent writer pronounces to be *absolutely incomprehensible*), the design of the constitution, we are told, was to unfetter the power from these two unintelligible limitations which had produced the controversy. See the Federalist, No. 42.

If, therefore, the grant to congress in the constitution, of the power to regulate commerce with *foreign nations, might by possibility have been construed* to extend to all nations *of a jurisdiction foreign to the government of the United States,* and thus to have embraced the Indian nations; yet as the far more natural construction would have been to confine the provision to nations *foreign in point of local situation;* and as a controversy had already arisen on the similar provision under the confederation, common prudence required the insertion of this specific power with regard to the Indian tribes. In point of *locality*, they are not *a foreign nation;* while, in point of *jurisdiction*, they are a *foreign state.* The *contradistinction*, therefore, between *foreign nations* and *Indian tribes*, in the article which gives the power to regulate commerce, being a contradistinction *in point of locality merely*, has no bearing on the question arising under the *judicial clause;* where the contradistinction is between *states of the union and states not of the union, in their political capacity alone.*

The court will be pleased to observe that the phrase is not the same in the two articles of the constitution which we are comparing. In the commercial clause it is *foreign nations*, in free and popular language. In the judicial clause it is a

foreign state; an exact technical expression, presenting the accurate idea of a separate political community under the law of nations, as contradistinguished from the political communities which compose the union. In the former case the mind is directed to *local situation* merely, without any reference to *political aspect:* in the latter it is exactly reversed, being directed to the *political aspect* only, without any regard to *local situation;* since it is manifest that to *the purposes* of the judicial clause, it is wholly immaterial *where* the state may exist, provided it be a *state foreign to the confederacy.*

We respectfully conceive, therefore, that there is nothing in this commercial clause which impugns, or even touches the construction which the judicial clause separately considered would present; that the Cherokee nation stands before you as a *foreign state* in the sense of that clause which marks out your jurisdiction; and consequently, that there is a competent plaintiff as well as a competent defendant to call forth the exercise of your original jurisdiction.

The parties, then, being right, the next question is,

2. Whether *the case*, as made by the bill, be a proper one for the jurisdiction of this court?

The judicial power of the United States extends, as we have seen, "to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority:" and

"*To controversies between a foreign state and a state of the union.*"

These are distinct heads of jurisdiction. The structure of the clause demonstrates that they are distinct heads. Thus the first head is that which has been stated: "all cases arising under the constitution, laws, and treaties of the United States:" the second is "to all cases affecting ambassadors, other public ministers, and consuls:" of these the court has jurisdiction from the *character of the party*, without regard to the *character of the controversy:* these high public functionaries have, therefore, a right to come into this court, whether the case arise under the constitution, laws and treaties of the United States, or not. Thirdly, "to all cases of admiralty and maritime jurisdiction:" though these may arise, not under the constitution, laws, and treaties of the United States, but under

the law of nations. Fourthly, "to controversies to which the United States shall be a party;" that is, to all such controversies, however arising. Fifthly, "to controversies between two or more states;" though such controversies do not arise either under the constitution, laws, or treaties of the United States; as in a question of boundary, or a question of any other kind between two or more states. Sixthly, "between citizens of different states," as in the cases continually occurring between such suitors in our circuit courts, which have nothing to do with the constitution, laws, or treaties of the United States. Seventhly, "between citizens of the same state, claiming lands under grants of different states;" clearly unconnected either with the constitution, laws, or treaties of the United States. Then follows the last head, as modified by the eleventh amendment; to wit, eighthly, "to *controversies* between *a state* and *a foreign state;*" that is, to all judicial controversies between such parties, whether they be or be not cases arising under the constitution, laws, or treaties of the United States; the jurisdiction being here, as in several of the preceding cases, given on account of *the character of the parties*, not on account of *the character of the controversy;* and with the manifest view of securing to the foreign party the most impartial tribunal which our institutions afford in every controversy with a state.

Even, therefore, if this were not *a case arising under the constitution, laws, or treaties of the United States,* yet if it be a *controversy between a foreign state and a state,* it falls within the judicial power of the United States: and a *state of the union being a party,* the *original* jurisdiction of this court attaches to the controversy, by the express provision of the second clause of this section.

Is it not, then, a controversy between a foreign state and a state of the union, in which these parties are asserting adversary claims to the same property, and to the right of jurisdiction over the same property? If it be, as it manifestly is; then, whether the decision of this controversy depends on the constitution, laws, or treaties of the United States, or upon the law of nations, it is a judicial controversy, to be settled by the application of the law to the case, and clearly belongs to the jurisdiction of this court.

But if it be necessary to found the jurisdiction of this court, that it should be "a case in law or equity arising under the constitution, laws, or treaties of the United States," then it is such a case; for it is the case of a *right to property and jurisdiction*, set up by the foreign state under a treaty of the United States, which same property and jurisdiction are claimed by a state of the union under her own laws, made, as the complainants allege, in repugnance to that treaty.

And here another part of the constitution comes directly to bear upon the subject: the second clause of the sixth article declares, that the constitution, laws, and treaties of the United States, shall be the supreme law of the land, and that *the judges* in every state shall be bound thereby, "*any thing in the constitution or laws of any state to the contrary notwithstanding.*"

Thus, the constitution seems to have contemplated the very case which is presented by the bill: the case of a law made by a state in violation of rights, founded on treaty: and it declares that in any such case the *judges* shall be bound by the treaty, notwithstanding the state law: a clear admission that *such a question* would be a *proper question for judges*, that is, *for judicial decision*, and as clear a declaration that the decision *of the judges* shall be governed *by the treaty* as *the supreme law.*

What is necessary to the constitution of *a case in law or equity?* Is any thing more necessary than that there be proper parties, and a subject matter of controversy proper for the decision of a court of law or a court of equity? But we have proved by the constitution that there are proper parties here, and the bill shows that it is a controversy in which rights of property and of person are claimed under a treaty on the one hand, and under the law of the state on the other; and the constitution, clearly contemplating such a case as coming before *the judges*, has declared that *the judges* shall be bound by the treaty, and not by the law of the state repugnant thereto.

You have, yourselves, never hesitated to take jurisdiction by writ of error to the supreme court of a state, where the same point of conflict has existed, and the decision of the state court has been in favour of the validity of the state law, against the right set up under a treaty. You have, hereby,

admitted that such a conflict presents *a case* within the sense of the constitution; for, if it did not, congress could not have conferred the jurisdiction as it has done by the twenty-fifth section of the judiciary act. How came the case of Hunter and Fairfax into this court, if such a collision be not *a case* within the sense of the constitution? There, one party claimed property under the law of a state, which the other claimed as protected by a treaty; and it was held to be *a case* proper for the jurisdiction of this court, within the meaning of the constitution of the United States. And is not the case of conflict between the state law and the treaty which existed there, the very conflict which exists and makes the case here? To be sure, there were *individual parties* there, and the case had been commenced in the state court; but we have shown that there are *proper parties* here, and that they have a right to claim the *original jurisdiction* of this court, and the only remaining question is about *the character of the case;* and if *the case* here presented do not belong to the judicial power of the United States, neither did *the case of Hunter and Fairfax* belong to it, nor was it in the power of congress by the twenty-fifth section of the judicial act, nor by any other act, to make it belong to it.

Suppose that one of these Cherokees should bring an action of false imprisonment against a sheriff of Georgia for arresting him within the Cherokee territory, and incarcerating him in a prison of Georgia; and the sheriff were to defend himself under the authority of the law of Georgia, to which the Cherokee should answer that the law was unconstitutional because repugnant to the treaties subsisting between his nation and the United States: can it be doubted that *the case* would properly belong to the judicial power of the United States, and that the action might be sustained by the Cherokee, if *an alien*, in the circuit court of Georgia, or, if not, that it might be brought hither from the supreme court of the state, if its decision should have been in favour of the state law against the treaty?

So suppose a Cherokee, having derived from the laws of his nation an individual right to a parcel of land within that territory, should be ejected from it by a Georgia claimant under the laws of that state; would not such a case be a proper

one for the judicial power of the United States, being a case of conflict between a right claimed under public treaties, and an adversary right claimed under a state law?

And if such a case would be *a case* within the meaning of the constitution if brought by individuals in a federal circuit court, or in a state court, is it less *a case within the meaning of the constitution*, when presented to the *original jurisdiction* of this court by parties who have a right to claim its original jurisdiction? If an individual Cherokee might maintain an action on such a case against a citizen of Georgia, in regard to a portion of these lands, if he had derived a separate right from the laws of the nation; cannot the Cherokee nation, who by their constitution and laws own the whole of these lands in common, bring an action for a disturbance of their possession against the state of Georgia, who asserts an adversary claim to the whole of their lands in mass? The state being suable by a foreign state before this tribunal, and the Cherokee nation having been shown to be a foreign state, what can be a more proper *case* for the judicial power of the United States than an antagonist claim asserted by a state of the union against a right set up under a long succession of treaties? In such a case the foreign state and the state of the union become *individual suitors* before this tribunal; and the case is as proper for this court, as a case for a part of the same subject, litigated on the same grounds, by private individuals before a circuit court.

The objection cannot be that *the case* is made by bodies politic and not private individuals, and that it involves both *territorial boundary* and *jurisdiction* to a whole country, instead of being a controversy among private persons as to a part of it. For what is the case between the state of New Jersey and the state of New York, of which you have taken jurisdiction, but a case made by bodies politic, involving both *territorial boundary* and *jurisdiction*, to an entire country, without regard to the private rights of individuals whose property lies along the disputed line. Your jurisdiction as to controversies between a foreign state and a state of the union stands upon the same footing precisely, as your jurisdiction of controversies between *two states*. It is no more defined or limited in the one case than the other. It stands in the same member of the same sentence, and is couched under the

very same expression with regard to both: it is declared to extend "to controversies between two or more states, and between a state and a foreign state." With regard to both, it is as various, as universal, as boundless as the field of controversy itself. It extends to *all controversies* (for there is no exception or specification), to all cases of disputed right that can arise between such parties, and which rest for their decision on an appeal to law, whether it be international law, or foreign law, or the constitution, laws and treaties of the United States. We are more familiar with controversies on a smaller scale, and our minds are habitually contracted to the contemplation of suits between private individuals or corporations. But the constitution rises to a bolder and grander view. It has created this noble and august tribunal for the peaceable settlement of controversies between states and nations, for which there was formerly no remedy but by an appeal to the sword. *A foreign state* is not *obliged* to come here *against a state of the union.* But, if she be peaceably disposed, *she may;* and if this court shall continue to maintain the high standing which it now holds among the nations of the earth, *she will.*

The erection of such a tribunal with such a jurisdiction was a sublime conception, and worthy of the minds which planned our constitution: nor can a more lofty spectacle be contemplated among men, than such a tribunal holding the balance of justice with a steady hand, between contending states and nations, and thus superseding the horrors of war, and performing the work of a God of peace, on the earth.

Will it be said that this is not a judicial but a political question; and that we are calling upon this court to usurp the functions of the executive and legislative branches of the government; in asking them to enforce the observance of a public treaty? If we were calling on you *to compel the United States* to observe a public treaty; or to *constrain a foreign state,* the other high contracting party, to its observance; the objection would be well founded. If we were asking you to entertain jurisdiction of a suit by Great Britain against the United States, or by the United States against Great Britain, with regard to the Canadian boundary; the objection would have place. That is a controversy between the high contracting parties, for the settlement of which no

tribunal has been provided, and no disinterested tribunal could, in the nature of things, be found in the courts of either nation. Hence, being peaceably disposed, they have found it necessary to resort to the friendly arbitrament of a third power which stands neutral in the case. But here the case is not between the high contracting parties. It is between one of those parties, and *a state of the union*, which *in her separate character of a state*, in which she is sued, is not a party to the treaty, though she is bound by its provisions; just as the individual citizens of the United States, though not *in their individual character* parties to our public treaties; are nevertheless bound by their provisions, and entitled to their protection.

Now the circumstance of a right in controversy, growing out of *a treaty* does not make that controversy a *political* instead of a *judicial* question; for if it did, you could not settle those controversies between individuals, which you are continually doing without question of its propriety. You are continually *enforcing treaties* where the controversy before you calls for their enforcement; and yet no one has ever objected that you are interfering with political questions. How could it be objected, when the constitution expressly commits to you *all cases in law and equity arising under treaties?*

The fact then, that the controversy *arises under a treaty*, or *grows out of its construction or validity;* does not make it a *political question*, so as to exclude it from the jurisdiction of this court.

Does it become a *political question*, whenever the right set up under the treaty is assailed by the law of a state? But that was exactly the case of Hunter and Fairfax, and of the recent Astor case from New York, the case of Carver and Jackson, 4 Peters, 1.

Does it become a political question, because one of the parties to the suit is one of the parties to the treaty? But that party, as we have shown, has a right to come here in *all controversies with a state:* and since *controversies arising under treaties* have been *expressly* made *judicial questions* by the constitution, with what propriety can it be said that this is not a judicial question?

Will it be said that it is not a *judicial* but a *political* question, because we bring no *specific case* before the court; but ask for a *general enforcement* of the treaty? But we do bring a *specific case* before the court, the *specific title* of the Cherokee lands; the *specific title of the jurisdiction of those lands:* questions quite as *specific* as those of which you have rightfully taken jurisdiction between the states of New Jersey and New York. Is not the right to a gold mine a *specific* case? If it be not, we must have another definition of a specific case from any that we have yet encountered.

In truth *every case is specific* in which *the property or right* in controversy *is so described, as to distinguish and separate it from all others of the kind;* which is the case here with regard both to the territory and jurisdiction. It is *the Cherokee territory described by metes and bounds; and it is the jurisdiction over that specific territory, and no other.* It is quite as specific as the controversy between Penn and Lord Baltimore, which was decided by the high court of chancery of England.

It may be said that our rights rest upon treaties which it is the peculiar function of the executive to enforce; that for an alleged breach of a treaty with a foreign state, the proper resort of the foreign state is to the president of the United States; and that it is his duty, with the co-operation of congress, either to redress the injury or to repel the charge; and that with this matter the courts of the United States have nothing to do.

Now, it is admitted, that in such a case, the most natural resort is to the president of the United States; and it is admitted, that it is his duty to redress the injury, if the means of doing so have been put at his disposal, as, in this case, they have been by the fifth section of the Indian intercourse act, which authorises him to employ the military force of the nation to remove intruders. But it does not by any means follow, that because the president *may* act upon the subject, the courts *shall not, if the controversy should take a judicial shape.*

The president may restore prizes taken by cruisers illegally fitted out in our ports from nations with whom we have treaties of amity, and this power was exercised during president Washington's administration: the power still exists: but if the

president does not choose to act upon the subject, our courts may do the same thing on a libel filed for restitution. Sergeant's Constitutional Law, 407, et seq. The example proves that there is no incongruity in the co-existence of a *similar* power in the executive and judicial branches of the government.

Indeed, a treaty being the supreme law of the land, which the judges, therefore, are bound to notice, in all judicial controversies that may come before them; it is not perceived how they can be relieved from this responsibility by showing that the executive branch have power to effect the same purpose in a different way.

This question came before this court in the case of the United States against the schooner Peggy, 1 Cranch, 103. That schooner had been captured by the Turnbull, a public armed sloop of the United States, during the short period of our hostilities with France in 1799–1800, and had been condemned by the circuit court as a lawful prize. An appeal was taken to this court, and, pending the appeal, the convention with France was made, by which it was agreed that all captured property, which had not been finally condemned, should be, without delay, restored or paid for. It seems to have been argued (for the argument is not reported) that this restoration, being in execution of a public treaty, was to be an *executive* act, and could not be performed by the *judiciary*. In answer to which the court say, "the constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted.

"It is certainly true that the execution of a contract between nations is to be demanded from, and, *in the general*, superintended by the executive of each nation, and, therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted. *But yet where a treaty is the law of the land and affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court as an act of congress;* and although restoration may be an executive, when viewed as a substantive

act, independent of and unconnected with other circumstances; yet to condemn a vessel, the restoration of which is directed by the law of the land, would be a direct infraction of that law, and, of consequence, improper."

Hence, although the expulsion of intruders *by a military force* from the lands guarantied by treaty to the Cherokees, may be, and is an executive when viewed as a substantive act; yet as the treaty affects the rights of parties litigating in court, that treaty, being a part of the supreme law of the land, is as obligatory on the courts as an act of congress. We do not ask this court to take command of the military force of the United States, and order them to drive off intruders from these guarantied lands, and to keep them off by force; for this would be calling on them to perform an executive act. But we come here with proper parties, according to the constitution of the United States, and with *a case* properly stated, and demand *the judgment* of this honourable court whether, according to the supreme law of the land, *the right of property and right of jurisdiction of a specific territory be in the plaintiffs or in the defendants?* The defendants assume their superior right, and are about to carry it into execution by a series of laws. The president, according to the allegations of the bill, disclaims any power to regard these laws of Georgia as unconstitutional.

Perhaps it may not be an *executive* power, thus to pronounce on the laws of a state. But we know that it is a *judicial power*, which has been repeatedly exercised by this tribunal; and it is one which the constitution devolves upon *the judges* in express terms, in declaring that they shall be bound by these treaties, "*any thing in the constitution or laws of a state to the contrary notwithstanding.*" So that if the president be right in the position that this power does not belong to *him*, there is no colour for the imputation that we are calling upon you for the exercise of executive functions, when we call upon you to declare these laws of Georgia unconstitutional and void, as being repugnant to our treaties. The president may, for aught we know, be waiting for such a decision to justify his action.

There is another view of this subject which has been publicly suggested, to which I advert with reluctance, because

it is a delicate one, and because I do not know that it will occur to this court as deserving serious attention. But we are without an adversary to state objections at the bar, and we are driven to the necessity of combating such as we have seen stated elsewhere.

The objection which I have now in view raises the question whether the decision of the executive upon this subject be not conclusive on the courts of the United States. It is supposed that, inasmuch as the execution of all public treaties belongs *in general* to the executive, his construction of what the treaty requires, or does not require to be done, is conclusive on the *judicial* branch of the government.

It is certainly to be desired that the most perfect harmony of action should subsist between the different branches of the government; but it would be paying rather a high price for it to permit any one branch to dictate to the rest, in matters equally binding on the consciences of all.

It is a part of the duty of the executive branch of the government to see to the execution of the acts of congress, no less than of the treaties of the United States; and it might with the same propriety be contended, that the construction placed by the executive on an act of congress was conclusive on the courts. But your honours know that this is not the case: on the contrary, the government has had to pay dearly for the president's constructions of divers acts of congress, which have been overruled by this honourable court. Witness among others, the cases of Gelston and Hoyt, 2 Wheat. 246, Otis and Walton, 2 Wheat. 18, the case of the Apollon, 9 Wheat. 362. If the president's construction of the constitution, laws, and treaties of the United States were to be final, he would only have to mark out a victim to the courts to ensure his condemnation. It is impossible that an argument can be sound which would reduce our constitution to a despotism.

If the course of action of this court were to be controlled by the decisions of the executive, your honours would often find yourselves in a dilemma, from which it would be difficult to escape. Take the case before you as an illustration.

The argument, which I am considering, is supposed to be this: it belongs to the executive of the United States, to determine the political condition of foreign countries. We

show the solemn recognition of the executive, *by treaty*, for five and forty years, that the Cherokee nation is a *foreign state*. Suppose the president, for the time being, to affirm that these are not *treaties* in the sense of the constitution, and consequently that they do not amount to recognition. But a former executive, president Washington, declared that they were treaties; and presidents Monroe and Adams in succession have done the same thing. By the sentence of which executive are you bound? By that of the president for the time being? But your honours hold your offices by a permanent appointment; while that of the executive is temporary. The consequence is, that if this question had come on during the presidency of General Washington, or during those of Mr Monroe and Mr Adams, these would have been treaties and would have so stood upon your records; while the renewal of the question at this time would lead to the opposite conclusion, and your records would bear evidence that they are not treaties; and after the next election of President, you would probably have to retrace your steps, to return to your first decision, and declare that they are treaties.

Suppose, *argumenti gratia*, that the present chief magistrate should declare not only that these are not treaties, and the guarantee a nullity; but that the intercourse act of 1802 is unconstitutional and void, and that he will not execute that law by the use of the means of fulfilling the guarantee, with which that act has furnished him. Are you to follow this decision too, because it is an executive decision?

But president Washington declared not only that these were treaties, but that *he would* use the means with which the constitution had clothed him, of protecting the Cherokees against intrusion. Every president and senate, since, have concurred: and presidents Monroe and Adams have actually used, against the state of Georgia, the means of fulfilling the guarantee with which the act of 1802 invested them; thereby affirming its constitutionality. Is the court to follow the present chief magistrate in the opinion that the act of 1802 is unconstitutional? Then he possesses the power of setting aside an act of congress as well as a treaty, and all the powers of the government are united in his hands: while the court, in following these varying decisions of our changing administra-

tions, will exhibit a picture of vacillation and inconsistency that might destroy all the respect which is now so justly and universally accorded to them. These consequences need only to be hinted to expose the unsoundness of the principle. The constitution expects every department to do its duty in its own sphere. If either of them fail, it meets its own appropriate responsibility; it has no right to expect any other to share in that responsibility. Following out this principle, this honourable court has declared acts of congress, as well as acts of the state legislatures, unconstitutional and void: has overruled the executive construction of laws; and has held on its own independent course by the lights of its own reason and conscience; sustained at every step, with increasing confidence, by the moral power of the American community.

Nothing, I respectfully think, can be clearer than that where a controversy comes before this court involving rights which are claimed under a public treaty, sanctioned according to the forms of our constitution, the validity of the treaty cannot be called in question; and that its construction is to be made by this honourable court, on their own independent views of the subject. Being a part of the supreme law of the land, it is the peculiar province of the court, to pronounce the law, wholly uninfluenced by the opinion of any other department: and Heaven forbid it should ever be otherwise.

We trust, therefore, it has been made clear that there are *proper parties* and a *proper case*, for the exercise of the jurisdiction of this court.

3. The only remaining question is whether the case be a proper one for *an injunction* from the chancery side of this honourable court?

I can anticipate only three objections to the award of an injunction.

1st. That if the laws of Georgia be unconstitutional, all the acts done under them are *trespasses*, and that then there is an adequate remedy at law.

2d. That a state cannot be injoined.

3d. That the Cherokee territory being out of the jurisdiction of the court, they cannot take judicial cognizance of the subject.

1st. With regard to the first objection it was so carefully

considered by this court in the case of Osborne against the Bank of the United States, 9 Wheaton, 738, that it would be idle to accumulate authorities on the subject. This is not the case of a solitary trespass which may be repaid in damages; but of an interminable series of continuing and irreparable trespasses, fraught with the entire destruction of these people and their country; a destruction which would be consummated before their legal title could be matured for decision before a court of law. The principle on which the injunction was supported in the case of Osborne applies *a fortiori*, to the present case, and is sustained by the whole current of authorities; Mitchell *vs.* Dors, 6 Ves. 147, and the cases collected in Eden on Injunction, 139, 140. 7 Johns. Chan. Cases, 321.

2d. As to the second objection, so far is the fact of a state's being the defendant from being an objection, that in the case of Osborne against the Bank of the United States, this court observes, that "*if* the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction." Here the state can be made a party; and it is the incessant repetition and continuance of the injury which she threatens that makes the injunction the peculiar and appropriate remedy: for if the injunction cannot be awarded, there can, virtually, be no remedy at all. The injunction will not act upon the ideal being, *the state*; but, as in Osborne's case, it will act on the officers of the state.

3d. As to the objection, that the Indian territory lies without the jurisdiction of this court, there are two answers, either of which would be sufficient.

The fact is, that although the Cherokee nation be a *foreign state* in the *political meaning* of *a foreign state*, with the sovereign power to give the law, exclusively, *within their own territory*, yet we have never denied that that territory is *locally* situated within *the chartered limits of Georgia*. This court has decided, in Fletcher and Peck, that these lands do lie within the state of Georgia; that by virtue of their *ultimate domain*, the state of Georgia is seised of the *present fee* in these lands; and in the same case the court is understood as having virtually decided, that the title to these lands, so far as that title rests upon the laws of Georgia or the United States, is a fit subject for investigation before this tribunal.

The second answer to the objection is, that even if the lands do lie beyond the jurisdiction of the court, yet if the *parties defendant be within their jurisdiction*, a court of chancery has never regarded the local situation of the lands as a bar to their action. *They act upon the parties*, and compel them to do what is right, or restrain them from doing what is wrong, let the lands out of which the controversy has grown lie where they may. The maxim is that *æquitas agit in personam*. Hence, in the case of Toller *vs.* Carteret, 2 Vernon, 494, the court of chancery in England decreed, *alternatively*, redemption or foreclosure of a mortgage on lands in the island of Sarke in Normandy. See also Eden on Injunctions, 102, 3, and the cases there cited; and Massie *vs.* Watts, 6 Cranch, 148, and the cases cited by the court.

Shall we be asked (the question has been asked elsewhere) how this court will enforce its injunction in case it shall be awarded? I answer that it will be time enough to meet that question, when it shall arise. At present the question is whether the court, by its constitution, possesses the jurisdiction to which we appeal; and it is beginning at the wrong end of the inquiry to ask how the jurisdiction, if possessed, is to be enforced. No court takes this course in deciding such a question. They examine the question of jurisdiction by the law which creates the tribunal and marks out its powers and duties. If they find the jurisdiction there, they exercise it; and leave to future consideration the mode of enforcing it in case it shall be resisted. In a land of laws, the presumption is that the decisions of courts will be respected; and in case they should not, it is a poor government indeed, in which there does not exist power to enforce respect. In the great case of Penn and Lord Baltimore, in which the boundaries of states in North America were in question, Lord Hardwicke did not ask himself how he was to enforce his decree. Although the tribunal was parted by the Atlantic ocean from the territory in question, he felt no embarrassment on that point. He took it for granted, as he had a right to do, that the parties would respect his decision. Had the idea even crossed his mind of their proving contumacious, he would have relied for the support of his authority on the general coercive powers

inherent in all courts; and, these failing, on the strong arm of that branch of the government whose duty it is to see that the laws be executed. Nor would his reliance have been in vain.

Sir, what is the value of that government in which the decrees of its courts can be mocked at and defied with impunity. Of that government did I say? It is no government at all, or at best a flimsy web of form, "capable of holding only the feeblest insects, while the more powerful of wing break through at pleasure."

If a strong state of this union assert a claim against a weak one, which the latter denies, where is the arbiter between them? Our constitution says that this court shall be the arbiter. But if the strong state refuses to submit to your arbitrament, what then? Are you to consider whether you can, of yourselves, and by the mere power inherent in the court, enforce your jurisdiction, before you will exercise it? Will you decline a jurisdiction clearly committed to you by the constitution, from the fear that you cannot by your own powers give it effect, and thus test the extent of your jurisdiction, not by the constitution, but by your own physical capacity to enforce it? Then why have you taken jurisdiction in the case of New Jersey and New York? The latter state has refused obedience to your summons. She refuses to appear. You have determined, nevertheless, and rightfully determined, to proceed with the cause. But suppose the question we are now considering to have been put to you in that case: how will you enforce your decree against New York? You tell her for example, that the boundary between the two states is that which New Jersey asserts, and that she is not to exercise jurisdiction beyond that boundary. New York laughs at your decree and sets it at defiance. Her marshal refuses to execute it, and the state upholds and protects him by force of arms, in his disobedience. She will not permit him to be attached for his contempt, and defies all your process of execution. New Jersey is too weak to enforce it. If the possibility of difficulty in enforcing your decrees is to drive you to a surrender of your jurisdiction, the argument applies as forcibly to the case of New Jersey and New York, as to the case of the Cherokee nation against the state of Georgia.

But, *if we have a government at all*, there is no difficulty in either case. In pronouncing your decree you will have *declared the law;* and it is a part of the sworn duty of the president of the United States, to "take care that the laws be faithfully executed." It is not for him, nor for the party defendant, to sit in appeal on your decision. The constitution confers no such power. He is authorized to call out the military power of the country to enforce the execution of the laws. It is your function to say what the law is. It is his to cause it to be executed. If he refuses to perform his duty, the constitution has provided a remedy.

But is this court to anticipate that the president will not do his duty, and to decline a given jurisdiction in that anticipation? Nay, are we to anticipate that a defendant state will not do her duty in submitting to the decree of this court? As to *menaces* of disobedience, the contumacy of a state to the authority of this court is not a new occurrence. It occurred in Olmstead's case. Pennsylvania there took this menacing attitude. Nay, she went further, and drew up an armed force in show of practical resistance. But was this court deterred by this menacing attitude? On the contrary, they did not even notice it, but moved on with the calm and constant dignity which alone becomes them, and Pennsylvania gave way, without striking a blow. Georgia, heretofore, assumed this same menacing attitude towards the Cherokees and the executive branch of the government; but former presidents gave her to understand that the United States would not permit the violation of subsisting treaties, and Georgia submitted to the decision.

Sir, unless the government be false to the trust which the people have confided to it, your authority will be sustained. I believe that if the injunction shall be awarded, there is a moral force in the public sentiment of the American community, which will, alone, sustain it, and constrain obedience. At all events, let us do our duty, and the people of the United States will take care that others do theirs. If they do not, there is an end of the government, and the union is dissolved.

For if the judiciary be struck from the system, what is there of any value that will remain? Sir, the government cannot

subsist without it. It would be as rational to talk of a solar system without a sun. No, sir, the people of the United States know the value of this institution too well, to suffer it to be put down, or trammelled in its action by the dictates of others. It will be sustained in whatever course its own wisdom, patriotism and virtues shall direct, by the respect, the affections, the suffrage, and, if necessary, by the arms of the country. It has been an object of reverence to the best and wisest men of our country, from the first movements of our constitution to the present day. It has been considered by them all as the key-stone of our political arch, the crown of its beauty, and the bond of its strength: nor will the people suffer it to be touched by rash and unskilful hands, for the worst of purposes, in the worst of times, even if there are any among us so hardy as to meditate it. If, then, I am asked how the injunction of this court, if granted, is to be enforced, I answer, fearlessly, by the majesty of the people of the United States, before which, canting anarchy (under the prostituted name of patriotism) and presuming ignorance, if they exist, will hide their heads.

Sir, I have done.

I have presented to you all the views that have occurred to me as bearing materially on this question. I have endeavoured to satisfy you that, according to the supreme law of the land, you have before you proper parties and a proper case to found your original jurisdiction: that the case is one which warrants and most imperiously demands an injunction, and, unless its aspect be altered by an answer and evidence (which I confidently believe it cannot be), that if there ever was a case which called for a decree of *perpetual peace*, this is the case.

It is with no ordinary feelings that I am about to take leave of this cause. The existence of this remnant of a once great and mighty nation is at stake, and it is for your honours to say, whether they shall be blotted out from the creation, in utter disregard of all our treaties. They are here in the last extremity, and with them must perish for ever the honour of the American name. The faith of our nation is fatally linked with their existence, and the blow which destroys them

quenches for ever our own glory: for what glory can there be of which a patriot can be proud, after the good name of his country shall have departed? We may gather laurels on the field and trophies on the ocean, but they will never hide this foul and bloody blot upon our escutcheon. "Remember, the Cherokee nation" will be answer enough to the proudest boasts that we can ever make—answer enough to cover with confusion the face and the heart of every man among us in whose bosom the last spark of grace has not been extinguished. Such, it is possible, there may be, who are willing to glory in their own shame, and to triumph in the disgrace which they are permitted to heap upon this nation. But, thank heaven, they are comparatively few. The great majority of the American people see this subject in its true light. They have hearts of flesh in their bosoms, instead of hearts of stone, and every rising and setting sun witnesses the smoke of the incense from the thousands and tens of thousands of domestic altars, ascending to the throne of grace to invoke its guidance and blessing on your councils. The most undoubting confidence is reposed in this tribunal.

We know that whatever can be properly done for this unfortunate people will be done by this honourable court. Their cause is one that must come home to every honest and feeling heart. They have been true and faithful to us and have a right to expect a corresponding fidelity on our part. Through a long course of years they have followed our counsel with the docility of children. *Our* wish has been *their* law. We asked them to become civilized, and they became so. They assumed our dress, copied our names, pursued our course of education, adopted our form of government, embraced our religion, and have been proud to imitate us in every thing in their power. They have watched the progress of our prosperity with the strongest interest, and have marked the rising grandeur of our nation with as much pride as if they had belonged to us. They have even adopted our resentments; and in our war with the Seminole tribes, they voluntarily joined our arms, and, gave effectual aid in driving back those barbarians from the very state that now oppresses them. They threw upon the field in that war, a body of

men, who proved by their martial bearing, their descent from the noble race that were once the lords of these extensive forests—men worthy to associate with the "lion," who, in their own language, "walks upon the mountain tops."(*a*) They fought side by side with our present chief magistrate, and received his repeated thanks for their gallantry and conduct.

May it please your honours, they have refused to us no gratification which it has been in their power to grant. We asked them for a portion of their lands, and they ceded it. We asked them again and again, and they continued to cede until they have now reduced themselves within the narrowest compass that their own subsistence will permit. What return are we about to make to them for all this kindness? We have pledged, for their protection and for the guarantee of the remainder of their lands, the faith and honour of our nation; a faith and honour never sullied, nor even drawn into question until now. We promised them, and they trusted us. *They have trusted us. Shall they be deceived?* They would as soon expect to see their rivers run upwards on their sources, or the sun roll back in his career, as that the United States would prove false to them, and false to the word so solemnly pledged by their Washington, and renewed and perpetuated by his illustrious successors.

Is this the high mark to which the American nation has been so strenuously and successfully passing forward? Shall we sell the mighty meed of our high honours, at so worthless a price, and in two short years, cancel all the glory which we have been gaining before the world, for the last half century? Forbid it, Heaven!

I will hope for better things. There is a spirit that will yet save us. I trust that we shall find it here, in this sacred court; where no foul and malignant demon of party enters to darken the understanding or to deaden the heart, but where all is clear, calm, pure, vital and firm. I cannot believe that this honourable court, possessing the power of preservation, will stand by, and see these people

(*a*) The Chieftain Ridge.

stripped of their property and extirpated from the earth, while they are holding up to us their treaties and claiming the fulfilment of our engagements. If truth and faith and honour and justice have fled from every other part of our country, we shall find them here. If not,—our sun has gone down in treachery, blood and crime, in the face of the world; and, instead of being proud of our country, as heretofore, we may well call upon the rocks and mountains to hide our shame from earth and heaven.

Mr Chief Justice MARSHALL delivered the opinion of the Court:

This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.

Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause?

The third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "between a state or the citizens thereof, and foreign states, citizens, or subjects." A subsequent clause of the same section gives the supreme court original jurisdiction in all

cases in which a state shall be a party. The party defendant may then unquestionably be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution?

The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains. Do the Cherokees constitute a foreign state in the sense of the constitution?

The counsel have shown conclusively that they are not a state of the union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.

This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.

[The Cherokee Nation *vs.* The State of Georgia.]

The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress." Treaties were made with some tribes by the state of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence.

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would

be considered by all as an invasion of our territory, and an act of hostility.

These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states.

In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbours, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such, that we should feel much difficulty in considering them as designated by the term *foreign state*, were there no other part of the constitution which might shed light on the meaning of these words. But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article; which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

The counsel for the plaintiffs contend that the words "In-

dian tribes" were introduced into the article, empowering congress to regulate commerce, for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the ninth article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it as granted in the confederation. This may be admitted without weakening the construction which has been intimated. Had the Indian tribes been foreign nations, in the view of the convention; this exclusive power of regulating intercourse with them might have been, and most probably would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several states." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.

It has been also said, that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true. In common language the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. This may not be equally true with respect to proper names. *Foreign nations* is a general term, the application of which to Indian tribes, when used in the American constitution, is at best extremely questionable. In one article in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other. We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term "foreign nations;" not we presume because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign state" is introduced, we cannot impute to the convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that

construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.

A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a state from the forcible exercise of legislative power over a neighbouring people, asserting their independence; their right to which the state denies. On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self government in their own country by the Cherokee nation, this court cannot interpose; at least in the form in which those matters are presented.

That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might perhaps be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savours too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

The motion for an injunction is denied.

Mr Justice Johnson.—In pursuance of my practice in giving an opinion on all constitutional questions, I must present my views on this. With the morality of the case I have no concern; I am called upon to consider it as a legal question.

[The Cherokee Nation *vs.* The State of Georgia.]

The object of this bill is to claim the interposition of this court as the means of preventing the state of Georgia, or the public functionaries of the state of Georgia, from asserting certain rights and powers over the country and people of the Cherokee nation.

It is not enough, in order to come before this court for relief, that a case of injury, or of cause to apprehend injury, should be made out. Besides having a cause of action, the complainant must bring himself within that description of parties, who alone are permitted, under the constitution, to bring an original suit to this court.

It is essential to such suit that a state of this union should be a party; so says the second member of the second section of the third article of the constitution: the other party must, under the control of the eleventh amendment, be another state of the union, or a foreign state. In this case, the averment is, that the complainant is a foreign state.

Two preliminary questions then present themselves.

1. Is the complainant a foreign state in the sense of the constitution?

2. Is the case presented in the bill one of judicial cognizance?

Until these questions are disposed of, we have no right to look into the nature of the controversy any farther than is necessary to determine them. The first of the questions necessarily resolves itself into two.

1. Are the Cherokees a state?

2. Are they a foreign state?

1. I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are. I would not here be understood as speaking of the Cherokees under their present form of government; which certainly must be classed among the most approved forms of civil government. Whether it can be yet said to have received the consistency which entitles that people to admission into the family of nations is, I conceive, yet to be determined by the executive of these states. Until then I must think that we cannot recognize it as an existing state,

under any other character than that which it has maintained hitherto as one of the Indian tribes or nations.

There are great difficulties hanging over the question, whether they can be considered as states under the judiciary article of the constitution. 1. They never have been recognized as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle, that discovery gave the right of dominion over the country discovered. When the populous and civilized nations beyond the Cape of Good Hope were visited, the right of discovery was made the ground of an exclusive right to their trade, and confined to that limit. When the eastern coast of this continent, and especially the part we inhabit, was discovered, finding it occupied by a race of hunters, connected in society by scarcely a semblance of organic government; the right was extended to the absolute appropriation of the territory, the annexation of it to the domain of the discoverer. It cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights, and there is not an instance of a cession of land from an Indian nation, in which the right of sovereignty is mentioned as a part of the matter ceded.

It may be suggested that they were uniformly cessions of land without inhabitants; and, therefore, words competent to make a cession of sovereignty were unnecessary. This, however, is not a full answer, since soil, as well as people, is the object of sovereign action, and may be ceded with or without the sovereignty, or may be ceded with the express stipulation that the inhabitants shall remove. In all the cessions to us from the civilized states of the old world, and of our transfers among ourselves, although of the same property, under the same circumstances, and even when occupied by these very Indians, the express cession of sovereignty is to be found.

In the very treaty of Hopewell, the language or evidence of which is appealed to as the leading proof of the existence of this supposed state, we find the commissioners of the United States expressing themselves in these terms. "The commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favour and protection of the

United States *on the following conditions.*" This is certainly the language of sovereigns and conquerors, and not the address of equals to equals. And again, when designating the country they are to be confined to, comprising the very territory which is the subject of this bill, they say, "Art. 4. *The boundary allotted to the Cherokees for their hunting grounds*" shall be as therein described. Certainly this is the language of concession on our part, not theirs; and when the full bearing and effect of those words, "for their hunting grounds," is considered, it is difficult to think that they were then regarded as a state, or even intended to be so regarded. It is clear that it was intended to give them no other rights over the territory than what were needed by a race of hunters; and it is not easy to see how their advancement beyond that state of society could ever have been promoted, or, perhaps, permitted, consistently with the unquestioned rights of the states, or United States, over the territory within their limits. The pre-emptive right, and exclusive right of conquest in case of war, was never questioned to exist in the states, which circumscribed the whole or any part of the Indian grounds or territory. To have taken it from them by direct means would have been a palpable violation of their rights. But every advance, from the hunter state to a more fixed state of society, must have a tendency to impair that pre-emptive right, and ultimately to destroy it altogether, both by increasing the Indian population, and by attaching them firmly to the soil. The hunter state bore within itself the promise of vacating the territory, because when game ceased, the hunter would go elsewhere to seek it. But a more fixed state of society would amount to a permanent destruction of the hope, and, of consequence, of the beneficial character of the pre-emptive right.

But it is said, that we have extended to them the means and inducement to become agricultural and civilized. It is true: and the immediate object of that policy was so obvious as probably to have intercepted the view of ulterior consequences. Independently of the general influence of humanity, these people were restless, warlike, and signally cruel in their irruptions during the revolution. The policy, therefore, of enticing them to the arts of peace, and to those improvements which war might lay desolate, was obvious; and it was wise

to prepare them for what was probably then contemplated, to wit, to incorporate them in time into our respective governments: a policy which their inveterate habits and deep seated enmity has altogether baffled. But the project of ultimately organizing them into states, within the limits of those states which had not ceded or should not cede to the United States the jurisdiction over the Indian territory within their bounds, could not possibly have entered into the contemplation of our government. Nothing but express authority from the states could have justified such a policy, pursued with such a view. To pursue this subject a little more categorically.

If these Indians are to be called a state: then,

1. By whom are they acknowledged as such?
2. When did they become so?
3. And what are the attributes by which they are identified with other states.

As to the first question, it is clear, that as a state they are known to nobody on earth, but ourselves, if to us: how then can they be said to be recognized as a member of the community of nations? Would any nation on earth treat with them as such? Suppose when they occupied the banks of the Mississippi or the sea coast of Florida, part of which in fact the Seminoles now occupy, they had declared war and issued letters of marque and reprisal against us or Great Britain, would their commissions be respected? If known as a state, it is by us and us alone; and what are the proofs? The treaty of Hopewell does not even give them a name other than that of *the Indians;* not even nation or state: but regards them as what they were, a band of hunters, occupying *as hunting grounds,* just what territory we chose to allot them. And almost every attribute of sovereignty is renounced by them in that very treaty. They acknowledge themselves to be under the sole and exclusive protection of the United States. They receive the territory allotted to them as a boon, from a master or conqueror; the right of punishing intruders into that territory is conceded, not asserted as a right; and the sole and exclusive right of regulating their trade and managing all their affairs in such manner as the government of the United States shall think proper; amounting in terms to a relinquishment of all

power, legislative, executive and judicial to the United States, is yielded in the ninth article.

It is true, that the twelfth article gives power to the Indians to send a deputy to congress; but such deputy, though dignified by the name, was nothing and could be nothing but an agent, such as any other company might be represented by. It cannot be supposed that he was to be recognized as a minister, or to sit in the congress as a delegate. There is nothing express and nothing implied, that would clothe him with the attributes of either of these characters. As to a seat among the delegates, it could not be granted to him.

There is one consequence that would necessarily flow from the recognition of this people as a state, which of itself must operate greatly against its admission.

Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state? We should indeed force into the family of nations, a very numerous and very heterogeneous progeny. The Catawbas, having indeed a few more acres than the republic of San Marino, but consisting only of eighty or an hundred polls, would then be admitted to the same dignity. They still claim independence, and actually execute their own penal laws, such as they are, even to the punishment of death; and have recently done so. We have many ancient treaties with them; and no nation has been more distinctly recognized, as far as such recognition can operate to communicate the character of a state.

But secondly, at what time did this people acquire the character of a state?

Certainly not by the treaty of Hopewell; for every provision of that treaty operates to strip it of its sovereign attributes; and nothing subsequent adds any thing to that treaty, except using the word *nation* instead of *Indians*. And as to that article in the treaty of Holston, and repeated in the treaty of Tellico, which guaranties to them their territory, since both those treaties refer to and confirm the treaty of Hopewell; on what principle can it be contended that the guarantee can go farther than to secure to them that right over the territory, which is conceded by the Hopewell treaty; which interest is only that of *hunting grounds*. The general policy of the

United States, which always looked to these Indian lands as a certain future acquisition, not less than the express words of the treaty of Hopewell, must so decide the question.

If they were not regarded as one of the family of nations at the time of that treaty, even though at that time first subdued and stripped of the attributes of a state, it is clear that, to be regarded now as a state, they must have resumed their rank among nations at some subsequent period. But at *what* subsequent period? Certainly by no decisive act until they organized themselves recently into a government; and I have before remarked that, until expressly recognized by the executive under that form of government, we cannot recognize any change in their form of existence. Others have a right to be consulted on the admission of new states into the national family. When this country was first appropriated or conquered by the crown of Great Britain, they certainly were not known as members of the community of nations; and if they had been, Great Britain from that time blotted them from among the race of sovereigns. From that time Great Britain considered them as her subjects whenever she chose to claim their allegiance; and their country as hers, both in soil and sovereignty. All the forbearance exercised towards them was considered as voluntary; and as their trade was more valuable to her than their territory, for that reason, and not from any supposed want of right to extend her laws over them, did she abstain from doing so.

And, thirdly, by what attributes is the Cherokee nation identified with other states?

The right of sovereignty was expressly assumed by Great Britain over their country at the first taking possession of it; and has never since been recognized as in them, otherwise than as dependent upon the will of a superior.

The right of legislation is in terms conceded to congress by the treaty of Hopewell, whenever they choose to exercise it. And the right of soil is held by the feeble tenure of hunting grounds, and acknowledged on all hands subject to a restriction to sell to no one but the United States, and for no use but that of Georgia.

They have in Europe sovereign and demi-sovereign states and states of doubtful sovereignty. But this state, if it be

a state, is still a grade below them all: for not to be able to alienate without permission of the remainder-man or lord, places them in a state of feudal dependence.

However, I will enlarge no more upon this point; because I believe, in one view and in one only, if at all, they are or may be deemed a state, though not a sovereign state, at least while they occupy a country within our limits. Their condition is something like that of the Israelites, when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal self government has never been taken from them; and such a form of government may exist though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self government may exist in them. And such they certainly do possess; it has never been questioned, nor any attempt made at subjugating them as a people, or restraining their personal liberty except as to their land and trade.

But in no sense can they be deemed a foreign state, under the judiciary article.

It does seem unnecessary on this point to do more than put the question, whether the makers of the constitution could have intended to designate them, when using the epithets "foreign" and "state." State, and foreign state, are used in contradistinction to each other. We had then just emerged ourselves from a situation having much stronger claims than the Indians for admission into the family of nations; and yet we were not admitted until we had declared ourselves no longer provinces but states, and shown some earnestness and capacity in asserting our claim to be enfranchised. Can it then be supposed, that when using those terms we meant to include any others than those who were admitted into the community of nations, of whom most notoriously the Indians were no part?

The argument is that they were states; and if not states of the union, must be foreign states. But I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and

having neither laws or government, beyond what is required in a savage state. The distinction is clearly made in that section which vests in congress power to regulate commerce between the United States with foreign nations and the Indian tribes.

The language must be applied in one of three senses; either in that of the law of nations, or of the vernacular use, or that of the constitution. In the first, although it means any state not subject to our laws, yet it must be a state and not a hunter horde: in the vernacular, it would not be applied to a people within our limits and at our very doors: and in the constitution the two epithets are used in direct contradistinction. The latter words were unnecessary, if the first included the Indian tribes. There is no ambiguity, though taken literally; and if there were, facts and circumstances altogether remove it.

But had I been sitting alone in this cause, I should have waived the consideration of personal description altogether; and put my rejection of this motion upon the nature of the claim set up, exclusively.

I cannot entertain a doubt that it is one of a political character altogether, and wholly unfit for the cognizance of a judicial tribunal. There is no possible view of the subject, that I can perceive, in which a court of justice can take jurisdiction of the questions made in the bill. The substance of its allegations may be thus set out.

That the complainants have been from time immemorial lords of the soil they occupy. That the limits by which they hold it have been solemnly designated and secured to them by treaty and by laws of the United States. That within those limits they have rightfully exercised unlimited jurisdiction, passing their own laws and administering justice in their own way. That in violation of their just rights so secured to them, the state of Georgia has passed laws, authorizing and requiring the executive and judicial powers of the state to enter their territory and put down their public functionaries. That in pursuance of those laws the functionaries of Georgia have entered their territory, with an armed force, and put down all powers legislative, executive and judicial, exercised under the government of the Indians.

What does this series of allegations exhibit but a state

of war, and the fact of invasion? They allege themselves to be a sovereign independent state, and set out that another sovereign state has, by its laws, its functionaries, and its armed force, invaded their state and put down their authority. This is war in fact; though not being declared with the usual solemnities, it may perhaps be called war in disguise. And the contest is distinctly a contest for empire. It is not a case of *meum and tuum* in the judicial but in the political sense. Not an appeal to laws but to force. A case in which a sovereign undertakes to assert his right upon his sovereign responsibility; to right himself, and not to appeal to any arbiter but the sword, for the justice of his cause. If the state of Maine were to extend its laws over the province of New Brunswick, and send its magistrates to carry them into effect, it would be a parallel case. In the Nabob of Arcot's case (4 Bro. Cha. Ca. and 1 and 2 Vesey, Jun.), a case of a political character not one half so strongly marked as this; the courts of Great Britain refused to take jurisdiction, because it had its origin in treaties entered into between sovereign states: a case in which the appeal is to the sword and to Almighty justice, and not to courts of law or equity. In the exercise of sovereign right, the sovereign is sole arbiter of his own justice. The penalty of wrong is war and subjugation.

But there is still another ground in this case, which alone would have prevented me from assuming jurisdiction; and that is the utter impossibility of doing justice, at least even handed justice, between the parties. As to restoring the complainant to the exercise of jurisdiction, it will be seen at once that that is no case for the action of a court; and as to quieting him in possession of the soil, what is the case on which the complainant would have this court to act? Either the Cherokee nation are a foreign state, or they are not. If they are not, then they cannot come here; and if they are, then how can we extend our jurisdiction into their country?

We are told that we can act upon the public functionaries in the state of Georgia, without the limits of the nation. But suppose that Georgia should file a cross-bill, as she certainly may, if we can entertain jurisdiction in this case; and should in her bill claim to be put in possession of the whole Indian country; and we should decide in her favour; how is

that decree to be carried into effect? Say as to soil; as to jurisdiction it is not even to be considered. From the complainant's own showing we could not do justice between the parties. Nor must I be considered as admitting that this court could even upon the other alternative exercise a jurisdiction over the person, respecting lands under the jurisdiction of a foreign nation. I know of no such instance. In Penn *vs.* Lord Baltimore, the persons were in England and the land within the king's dominions though in America.

There is still another view in which this cause of action may be considered in regard to its political nature. The United States finding themselves involved in conflicting treaties, or at least in two treaties respecting the same property, under which two parties assert conflicting claims; one of the parties, putting itself upon its sovereign right, passes laws which in effect declare the laws and treaties under which the other party claims, null and void. It proceeds to carry into effect those laws by means of physical force; and the other party appeals to the executive department for protection. Being disappointed there, the party appeals to this court, indirectly to compel the executive to pursue a course of policy, which his sense of duty or ideas of the law may indicate should not be pursued. That is, to declare war against a state, or to use the public force to repel the force and resist the laws of a state, when his judgment tells him the evils to grow out of such a course may be incalculable.

What these people may have a right to claim of the executive power is one thing: whether we are to be the instruments to compel another branch of the government to make good the stipulations of treaties, is a very different question. Courts of justice are properly excluded from all considerations of policy, and therefore are very unfit instruments to control the action of that branch of government; which may often be compelled by the highest considerations of public policy to withhold even the exercise of a positive duty.

There is then a great deal of good sense in the rule laid down in the Nabob of Arcot's case, to wit, that as between sovereigns, breaches of treaty were not breaches of contract cognizable in a court of justice; independent of the general principle that for their political acts states were not amenable to tribunals of justice.

There is yet another view of this subject, which forbids our taking jurisdiction. There is a law of the United States, which purports to make every trespass set out in the bill to be an offence cognizable in the courts of the United States. I mean the act of 1802, which makes it penal to violate the Indian territory.

The infraction of this law is in effect the burden of complaint. What then in fact is this bill, but a bill to obtain an injunction against the commission of crimes? If their territory has been trespassed upon against the provisions of that act, no law of Georgia could repeal that act or justify the violation of its provisions. And the remedy lies in another court and form of action, or another branch of jurisprudence.

I cannot take leave of the case without one remark upon the leading argument, on which the exercise of jurisdiction here over cases occurring in the Indian country has been claimed for the complainant. Which was, that the United States in fact exercised jurisdiction over it by means of this and other acts, to punish offences committed there.

But this argument cannot bear the test of principle. For the jurisdiction of a country may be exercised over her citizens wherever they are, in right of their allegiance; as it has been in the instance of punishing offences committed against the Indians. And, also, both under the constitution and the treaty of Hopewell, the power of congress extends to regulating their trade, necessarily within their limits. But this cannot sanction the exercise of jurisdiction beyond the policy of the acts themselves; which are altogether penal in their provisions.

I vote for rejecting the motion.

Mr Justice Baldwin.—As jurisdiction is the first question which must arise in every cause, I have confined my examination of this, entirely to that point, and that branch of it which relates to the capacity of the plaintiffs to ask the interposition of this court. I concur in the opinion of the court in dismissing the bill, but not for the reasons assigned.

In my opinion there is no plaintiff in this suit; and this opinion precludes any examination into the merits of the bill, or the weight of any minor objections. My judgment stops

me at the threshold, and forbids me to examine into the acts complained of.

As the reasons for the judgment of the court seem to me more important than the judgment itself, in its effects on the peace of the country and the condition of the complainants, and as I stand alone on one question of vital concern to both; I must give my reasons in full. The opinion of this court is of high authority in itself; and the judge who delivers it has a support as strong in moral influence over public opinion, as any human tribunal can impart. The judge, who stands alone in decided dissent on matters of the infinite magnitude which this case presents, must sink under the continued and unequal struggle; unless he can fix himself by a firm hold on the constitution and laws of the country. He must be presumed to be in the wrong, until he proves himself to be in the right. Not shrinking even from this fearful issue, I proceed to consider the only question which I shall ever examine in relation to the rights of Indians to sue in the federal courts, until convinced of my error in my present convictions.

My view of the plaintiffs being a sovereign independent nation or foreign state, within the meaning of the constitution, applies to all the tribes with whom the United States have held treaties: for if one is a foreign nation or state, all others in like condition must be so in their aggregate capacity; and each of their subjects or citizens, aliens, capable of suing in the circuit courts. This case then is the case of the countless tribes, who occupy tracts of our vast domain; who, in their collective and individual characters, as states or aliens, will rush to the federal courts in endless controversies, growing out of the laws of the states or of congress.

In the spirit of the maxim *obsta principiis*, I shall first proceed to the consideration of the proceedings of the old congress, from the commencement of the revolution up to the adoption of the constitution; so as to ascertain whether the Indians were considered and treated with as tribes of savages, or independent nations, foreign states on an equality with any other foreign state or nation; and whether Indian affairs were viewed as those of foreign *nations*, and in connection with this view, refer to the acts of the federal government on the same subject.

In 1781 (1 Laws U. S. 586, &c.) a department for foreign affairs was established, to which was entrusted all correspondence and communication with the ministers or other officers of foreign powers, to be carried on through that office; also with the governors and presidents of the several states; and to receive the applications of all foreigners, letters of sovereign powers, plans of treaties, conventions, &c. and other acts of congress relative to the department of foreign affairs; and all communications as well to as from the United States in congress assembled were to be made through the secretary, and all papers on the subject of foreign affairs to be addressed to him. The same department was established under the present constitution in 1789, and with the same exclusive control over all the foreign concerns of this government with foreign states or princes. 2 Laws U. S. 6, 7. In July 1775, congress established a department of Indian affairs, to be conducted under the superintendence of commissioners. 1 Laws U. S. 597. By the ordinance of August 1786, for the regulation of Indian affairs, they were placed under the control of the war department, 1 Laws U. S. 614, continued there by the act of August 1789 (2 Laws U. S. 32, 33), under whose direction they have ever since remained. It is clear then, that neither the old or new government did ever consider Indian affairs, the regulation of our intercourse or treaties with them, as forming any part of our foreign affairs or concerns with foreign nations, states, or princes.

I will next inquire how the Indians were considered; whether as independent nations or tribes, with whom our intercourse must be regulated by the law of circumstances. In this examination it will be found that different words have been applied to them in treaties and resolutions of congress; nations, tribes, hordes, savages, chiefs, sachems and warriors of the Cherokees for instance, or the Cherokee nation. I shall not stop to inquire into the effect which a name or title can give to a resolve of congress, a treaty or convention with the Indians, but into the substance of the thing done, and the subject matter acted on: believing it requires no reasoning to prove that the omission of the words *prince, state, sovereignty* or *nation,* cannot divest a contracting party of these na-

tional attributes, which are inherent in sovereign power pre and self existing, or confer them by their use, where all the substantial requisites of sovereignty are wanting.

The proceedings of the old congress will be found in 1, Laws U. S. 597, commencing 1st. June 1775, and ending 1st September 1788, of which some extracts will be given. 30th June 1775, "Resolved, that the committee for Indian affairs do prepare proper talks to the several tribes of Indians. As the Indians depend on the colonists for arms, ammunition and clothing, which are become necessary for their subsistence." "That the commissioners have power to treat with the Indians:" "to take to their assistance gentlemen of influence among the Indians." "To preserve the confidence and friendship of the Indians, and prevent their suffering for want of the necessaries of life, £40,000 sterling of Indian goods be imported." "No person shall be permitted to trade with the Indians without a licence;" "traders shall sell their goods at reasonable prices; allow them to the Indians for their skins, and take no advantage of their distress and intemperance;" "the trade to be only at posts designated by the commissioners." Specimens of the kind of intercourse between the congress and deputations of Indians may be seen in pages 602 and 603. They need no incorporation into a judicial opinion.

In 1782, a committee of congress report, that all the lands belonging to the six nations of Indians have been in due form put under the crown as appendant to the government of New York, so far as respects jurisdiction only; that that colony has borne the burthen of protecting and supporting the six nations of Indians and their tributaries for one hundred years, as the dependents and allies of that government; that the crown of England has always considered and treated the country of the six nations as one appendant to the government of New York; that they have been so recognized and admitted by their public acts by Massachusetts, Connecticut, Pennsylvania, Maryland and Virginia; that by accepting this cession, the jurisdiction of the whole western territory, belonging to the six nations and their tributaries, will be vested in the United States, greatly to the advantage of the union [p. 606]. The cession alluded to is the

one from New York, March 1st, 1781, of the soil and jurisdiction of all the land in their charter west of the present boundary of Pennsylvania (1 Laws U. S. 471), which was executed in congress and accepted.

This makes it necessary to break in on the historical trace of our Indian affairs, and follow up this subject to the adoption of the constitution. The cession from Virginia in 1784 was of soil and jurisdiction. So from Massachusetts in 1785, from Connecticut in 1800, from South Carolina in 1787, from Georgia in 1802. North Carolina made a partial cession of land, but a full one of her sovereignty and jurisdiction of all without her present limits in 1789. 2 Laws United States 85.

Some states made reservations of lands to a small amount, but, by the terms of the cession, new states were to be formed within the ceded boundaries, to be admitted into the union on an equal footing with the original states; of course, not shorn of their powers of sovereignty and jurisdiction within the boundaries assigned by congress to the new states. In this spirit congress passed the celebrated ordinance of July 1787, by which they assumed the government of the north western territory, paying no regard to Indian jurisdiction, sovereignty, or their political rights, except providing for their protection; authorizing the adoption of laws "which, for the prevention of crimes and injuries, shall have force in all parts of the district; and for the execution of process civil and criminal, the governor has power to make proper division thereof." 1 Laws United States, 477. By the fourth article the *said territory*, and the states which may be formed therein, shall for ever remain a part of this confederacy of the United States; subject to the articles of confederation, alterations constitutionally made, the acts and ordinances of congress.

This shows the clear meaning and understanding of all the ceding states, and of congress, in accepting the cession of their western lands up to the time of the adoption of the constitution. The application of these acts to the provisions of the constitution will be considered hereafter. A few more references to the proceedings of the old congress in relation to the Indian nations will close this view of the case.

[The Cherokee Nation vs. The State of Georgia.]

In 1782, a committee, to whom was referred a letter from the secretary at war, reported "that they have had a conference with the two deputies from the Catawba nation of Indians: that their mission respects certain tracts of land reserved for their use in the state of South Carolina, which they wish may be so secured to their *tribe*, as not to be intruded into by force, nor alienated even with their own consent:—whereupon, resolved, that it be recommended to the legislature of South Carolina to take such measures for the satisfaction and security of the said tribe, as the said legislature shall in their wisdom think fit." 1 Laws United States, 667. After this, the Catawbas cannot well be considered an independent nation or foreign state. In September 1783, shortly after the preliminary treaty of peace, congress, exercising the powers of acknowledged independence and sovereignty, issued a proclamation beginning in these words: "whereas, by the ninth of the articles of confederation, it is, among other things declared, that the United States, in congress assembled, have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians not members of any of the states, provided that the legislative right of every state, within its own limits, be not infringed or violated," prohibiting settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular state, and from purchasing or receiving gifts of land, without the express authority and directions of the United States in congress assembled. Conventions were to be held with the Indians in the northern and middle departments for the purpose of receiving them into the favour and protection of the United States, and of establishing boundary lines of *property*, for separating and dividing the settlements of the citizens from the Indian villages and hunting grounds, &c. "Resolved that the preceding measures of congress, relative to Indian affairs, shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits. Resolved, that it will be wise and necessary to erect a district of the western territory into a distinct government, and that a committee be appointed to prepare a plan for a temporary government until the inhabitants shall form a "permanent constitution

for themselves, and as citizens of a free, sovereign, and independent state, be admitted to a representation in the union." In 1786, a general ordinance was passed for the regulation of Indian affairs under the authority of the ninth article of the confederation, which throws much light on our relations with them. P. 614. It closes with a direction, that in all cases where transactions with any nation or tribe of Indians shall become necessary for the purposes of the ordinance, which cannot be done without interfering with the legislative rights of a state, the superintendent within whose district the same shall happen, shall act in conjunction with the authority of such state.

After accepting the cessions of the soil and jurisdiction of the western territory, and resolving to form a temporary government, and create new, free, sovereign, and independent states, congress resolved, in March 1785, to hold a treaty with the western Indians. They gave instructions to the commissioners in strict conformity with their preceding resolutions, both of which were wholly incompatible with the national or sovereign character of the Indians with whom they were about to treat. They will be formed in pages 611, &c. and need not be particularized.

I now proceed to the instructions which preceded the treaty of Hopewell with the complainants, the treaty, and the consequent proceedings of congress. On the 15th March 1785, commissioners were appointed to treat with the Cherokees and other Indians, southward of them, within the limits of the United States, or who have been at war with them, for the purpose of making peace with them, and of receiving them into the favour and protection of the United States, &c. They were instructed to demand that all prisoners, negroes and other property taken during the war be given up; to inform the Indians of the great occurrences of the last war; of the extent of country relinquished by the late treaty of peace with Great Britain; to give notice to the governors of Virginia, North and South Carolina and Georgia that they may attend if they think proper: and were authorized to expend four thousand dollars in making presents to the Indians; a matter well understood in making Indian treaties, but unknown at least in our treaties with foreign nations, princes

or states, unless on the Barbary coast. A treaty was accordingly made in November following, between the commissioners plenipotentiaries of the United States of the one part, and the head men and warriors of all the Cherokees of the other. The word *nation* is not used in the preamble or any part of the treaty, so that we are left to infer the capacity in which the Cherokees contracted, whether as an independent nation or foreign state or a tribe of Indians, from the terms of the treaty, its stipulations and conditions. "The Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States." Article 3d. 1 Laws U. S. 322. "The boundary allotted to the Cherokees for their hunting grounds between the said Indians and the citizens of the United States, within the limits of the United States, is and shall be the following," viz. (as defined in Article 4th). "For the benefit and comfort of the Indians, and for the prevention of injuries and aggressions on the part of the citizens or Indians, the United States in congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they shall think proper. Article 9. "That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have the right to send a deputy of their choice whenever they think fit to congress." Article 12th.

This treaty is in the beginning called "Article:" the word "treaty" is only to be found in the concluding line, where it is called "*this definitive treaty.*" But article or treaty, its nature does not depend upon the name given it. It is not negotiated between ministers on both sides representing their nations; the stipulations are wholly inconsistent with sovereignty; the Indians acknowledge their dependent character; hold the lands they occupy as an allotment of hunting grounds; give to congress the exclusive right of regulating their trade and managing all their affairs as they may think proper. So it was understood by congress as declared by them in their proclamation of 1st September 1788 (1 Laws U. S. 619), and so understood at the adoption of the constitution.

The meaning of the words "deputy to congress" in the twelfth article may be as a person having a right to sit in that body, as at that time it was composed of delegates or deputies from the states, not as at present, representatives of the people of the states; or it may be as an agent or minister. But if the former was the meaning of the parties, it is conclusive to show that he was not and could not be the deputy of a foreign state wholly separated from the union. If he sat in congress as a deputy from any state, it must be one having a political connection with, and within the jurisdiction of the confederacy; if as a diplomatic agent, he could not represent an independent or sovereign nation, for all such have an unquestioned right to send such agents when and where they please. The securing the right by an express stipulation of the treaty; the declared objects in conferring the right especially when connected with the ninth article; show beyond a doubt it was not to represent a foreign state or nation or one to whom the least vestige of independence or sovereignty as to the United States appertained. There can be no dependence so anti-national, or so utterly subversive of national existence as transferring to a foreign government the regulation of its trade, and the management of all their affairs at their pleasure. The nation or state, tribe or village, head men or warriors of the Cherokees, call them by what name we please, call the articles they have signed a definitive treaty or an indenture of servitude; they are not by its force or virtue a foreign state capable of calling into legitimate action the judicial power of this union, by the exercise of the original jurisdiction of this court against a sovereign state, a component part of this nation. Unless the constitution has imparted to the Cherokees a national character never recognized under the confederation; and which if they ever enjoyed was surrendered by the treaty of Hopewell; they cannot be deemed in this court plaintiffs in such a case as this.

In considering the bearing of the constitution on their rights, it must be borne in mind, that a majority of the states represented in the convention had ceded to the United States the soil and jurisdiction of their western lands, or claimed it to be remaining in themselves; that congress asserted as to the ceded, and the states as to the unceded territory, their right to the soil absolutely and the dominion in full sovereignty,

within their respective limits, subject only to Indian occupancy, not as foreign states or nations, but as dependent on and appendant to the state governments: that before the convention acted, congress had erected a government in the north western territory containing numerous and powerful nations or tribes of Indians, whose jurisdiction was ~~continued~~ and whose sovereignty was overturned, if it ever existed, except by permission of the states or congress, by ordaining that the territorial laws should extend over the whole district; and directing divisions for the execution of civil and criminal process in every part; that the Cherokees were then dependants, having given up all their affairs to the regulation and management of congress, and that all the regulations of congress, over Indian affairs were then in force over an immense territory, under a solemn pledge to the inhabitants, that whenever their population and circumstances would admit they should form constitutions and become free, sovereign and independent states on equal footing with the old component members of the confederation; that by the existing regulations and treaties, the Indian tenure to their lands was their allotment as hunting grounds without the power of alienation, that the right of occupancy was not individual, that the Indians were forbidden all trade or intercourse with any person not licensed or at a post not designated by regulation, that Indian affairs formed no part of the foreign concerns of the government, and that though they were permitted to regulate their internal affairs in their own way, it was not by any inherent right acknowledged by congress or reserved by treaty, but because congress did not think proper to exercise the sole and exclusive right, declared and asserted in all their regulations from 1775 to 1788, in the articles of confederation, in the ordinance of 1787 and the proclamation of 1788; which the plaintiffs solemnly recognized and expressly granted by the treaty of Hopewell in 1785, as conferred on congress to be exercised as they should think proper.

To correctly understand the constitution, then, we must read it with reference to this well known existing state of our relations with the Indians; the United States asserting the right of soil, sovereignty, and jurisdiction, in full dominion; the Indians occupant, of allotted hunting grounds.

We can thus expound the constitution without a reference

to the definitions of a state or nation by any foreign writer, hypothetical reasoning, or the dissertations of the Federalist. This would be to substitute individual authority in place of the declared will of the sovereign power of the union, in a written fundamental law. Whether it is the emanation from the people or the states, is a moot question, having no bearing on the supremacy of that supreme law which from a proper source has rightfully been imposed on us by sovereign power. Where its terms are plain, I should, as a dissenting judge, deem it judicial sacrilege to put my hands on any of its provisions, and arrange or construe them according to any fancied use, object, purpose, or motive, which, by an ingenious train of reasoning, I might bring my mind to believe was the reason for its adoption by the sovereign power, from whose hands it comes to me as the rule and guide to my faith, my reason, and judicial oath. In taking out, putting in, or varying the plain meaning of a word or expression, to meet the results of my poor judgment, as to the meaning and intention of the great charter, which alone imparts to me my power to act as a judge of its supreme injunctions, I should feel myself acting upon it by judicial amendments, and not as one of its executors. I will not add unto these things; I will not take away from the words of this book of prophecy; I will not impair the force or obligation of its enactments, plain and unqualified in its terms, by resorting to the authority of names; the decisions of foreign courts; or a reference to books or writers. The plain ordinances are a safe guide to my judgment. When they admit of doubt, I will connect the words with the practice, usages, and settled principles of this government, as administered by its fathers before the adoption of the constitution: and refer to the received opinion and fixed understanding of the high parties who adopted it; the usage and practice of the new government acting under its authority; and the solemn decisions of this court, acting under its high powers and responsibility: nothing fearing that in so doing, I can discover some sound and safe maxims of American policy and jurisprudence, which will always afford me light enough to decide on the constitutional powers of the federal and state governments, and all tribunals acting under their authority. They will at least enable me to judge of the true meaning and

spirit of plain words, put into the forms of constitutional provisions, which this court in the great case of Sturges and Crowninshield say, "is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable." But the absurdity and injustice of applying the provision to the case must be so monstrous, that all mankind would without hesitation unite in rejecting the application. 4 Wheat. 202, 3.

In another great case, Cohens *vs.* Virginia, this court say, "the jurisdiction of this court then, being extended by the letter of the constitution to all cases arising under it or under the laws of the United States, it follows that those, who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed." 6 Wheat. 379, 80.

The principle of these cases is my guide in this. Sitting here, I shall always bow to such authority; and require no admonition to be influenced by no other, in a case where I am called on to take a part in the exercise of the judicial power over a sovereign state.

Guided by these principles, I come to consider the third clause of the second section of the first article of the constitution; which provides for the apportionment of representatives, and direct taxes "among the several states which may be included within this union, according to their respective numbers, *excluding Indians not taxed.*" This clause embraces not only the old but the new states to be formed out of the territory of the United States, pursuant to the resolutions and ordinances of the old congress, and the conditions of the cession from the states, or which might arise by the division of the old. If the clause excluding Indians not taxed had not been inserted, or should be stricken out, the whole free Indian

population of all the states would be included in the federal numbers, coextensively with the boundaries of all the states, included in this union. The insertion of this clause conveys a clear definite declaration that there were no independent sovereign nations or states, foreign or domestic, within their boundaries, which should exclude them from the federal enumeration, or any bodies or communities within the states, excluded from the action of the federal constitution unless by the use of express words of exclusion.

The delegates who represented the states in the convention well knew the existing relations between the United States and the Indians, and put the constitution in a shape for adoption calculated to meet them; and the words used in this clause exclude the existence of the plaintiffs as a sovereign or foreign state or nation, within the meaning of this section, too plainly to require illustration or argument.

The third clause of the eighth article shows most distinctly the sense of the convention in authorising congress to regulate commerce with the Indian tribes. The character of the Indian communities had been settled by many years of uniform usage under the old government: characterized by the name of nations, towns, villages, tribes, head men and warriors, as the writers of resolutions or treaties might fancy; governed by no settled rule, and applying the word nation to the Catawbas as well as the Cherokees. The framers of the constitution have thought proper to define their meaning to be, that they were not foreign nations nor states of the union, but Indian tribes; thus declaring the sense in which they should be considered under the constitution, which refers to them as tribes only, in this clause. I cannot strike these words from the book; or construe Indian tribes in this part of the constitution to mean a sovereign state under the first clause of the second section of the third article. It would be taking very great liberty in the exposition of a fundamental law, to bring the Indians under the action of the legislative power as tribes, and of the judicial, as foreign states. The power conferred to regulate commerce with the Indian tribes, is the same given to the old congress by the ninth article of the old confederation, "to regulate trade with the Indians." The raising the word "trade" to the dignity of commerce, regu-

lating it with Indians or Indian tribes, is only a change of words. Mere phraseology cannot make Indians nations, or Indian tribes foreign states.

The second clause of the third section of the fourth article of the constitution is equally convincing. "The congress shall have power to dispose of, and make all needful regulations and rules respecting the territory of the United States." What that territory was, the rights of soil, jurisdiction, and sovereignty claimed and exercised by the states and the old congress, has been already seen. It extended to the formation of a government whose laws and process were in force within its whole extent, without a saving of Indian jurisdiction. It is the same power which was delegated to the old congress, and, according to the judicial interpretation given by this court in Gibbons *vs.* Ogden, 9 Wheaton, 209, the word "to regulate" implied in its nature full power over the thing to be regulated; it excludes, necessarily, the action of all others that would perform the same operation on the same thing. Applying this construction to commerce and territory, leaves the jurisdiction and sovereignty of the Indian tribes wholly out of the question. The power given in this clause is of the most plenary kind. Rules and regulations *respecting* the territory of the United States; they necessarily include complete jurisdiction. It was necessary to confer it without limitation, to enable the new government to redeem the pledge given by the old in relation to the formation and powers of the new states. The saving of "the claims" of "any particular state" is almost a copy of a similar provision, part of the ninth article of the old confederation; thus delivering over to the new congress the power to regulate commerce with the Indian tribes, and regulate the territory they occupied, as the old had done from the beginning of the revolution.

The only remaining clause of the constitution to be considered is the second clause in the sixth article. "All treaties made, or to be made, shall be the supreme law of the land."

In Chirac *vs.* Chirac, this court declared that it was unnecessary to inquire into the effect of the treaty with France in 1778 under the old confederation, because the confederation had yielded to our present constitution, and this treaty had been the supreme law of the land. 2 Wheaton, 271. I con-

sider the same rule as applicable to Indian treaties, whether considered as national compacts between sovereign powers, or as articles, agreements, contracts or stipulations on the part of this government, binding and pledging the faith of the nation to the faithful observance of its conditions. They secure to the Indians the enjoyment of the rights they stipulate to give or secure, to their full extent, and in the plenitude of good faith; but the treaties must be considered as the rules of reciprocal obligations. The Indians must have their rights; but must claim them in that capacity in which they received the grant or guarantee. They contracted by putting themselves under the protection of the United States, accepted of an allotment of hunting grounds, surrendered and delegated to congress the exclusive regulation of their trade and the management of all their own affairs, taking no assurance of their continued sovereignty, if they had any before, but relying on the assurance of the United States that they might have full confidence in their justice respecting their interests; stipulating only for the right of sending a deputy of their own choice to congress. If, then, the Indians claim admission to this court under the treaty of Hopewell, they cannot be admitted as foreign states, and can be received in no other capacity.

The legislation of congress under the constitution in relation to the Indians has been in the same spirit and guided by the same principles, which prevailed in the old congress and under the old confederation. In order to give full effect to the ordinance of 1787, in the north west territory, it was adapted to the present constitution of the United States in 1789, 2 Laws U. S. 33; applied as the rule for its government to the territory south of the Ohio in 1790, except the sixth article, 2 Laws U. S. 104; to the Mississippi territory in 1798, 3 Laws U. S. 39, 40 and with no exception to Indiana in 1800, 3 Laws U. S. 367; to Michigan in 1805, 3 Laws U. S. 632; to Illinois in 1809, 4 Laws U. S. 198.

In 1802 congress passed the act regulating trade and intercourse with the Indian tribes, in which they assert all the rights exercised over them under the old confederation, and do not alter in any degree their political relations, 3 Laws U. S. 460, et seq. In the same year Georgia ceded her lands west of her present boundary to the United States; and by the

second article of the convention the United States ceded to Georgia whatever claim, right or title they may have to the jurisdiction or soil of any lands south of Tennessee, North or South Carolina and east of the line of the cession by Georgia. So that Georgia now has all the rights attached to her by her sovereignty within her limits, and which are saved to her by the second section of the fourth article of the constitution, and all the United States could cede either by their power over the territory or their treaties with the Cherokees.

The treaty with the Cherokees, made at Holston in 1791, contains only one article which has a bearing on the political relations of the contracting parties. In the second article the Cherokees stipulate "that the said Cherokee nation will not hold any treaty with any foreign power, individual state, *or with individuals of any state.*" 1 Laws U. S. 326. This affords an instructive definition of the words *nation* and *treaty*. At the treaty of Hopewell the Cherokees, though subdued and suing for peace, before divesting themselves of any of the rights or attributes of sovereignty which this government ever recognized them as possessing by the consummation of the treaty, contracted in the name of the head men and warriors of all the Cherokees; but at Holston in 1791, in abandoning their last remnant of political right, contracted as the Cherokee nation, thus ascending in title as they descended in power, and applying the word treaty to a contract with an individual: this consideration will divest words of their magic.

In thus testing the rights of the complainants as to their national character by the old confederation, resolutions and ordinances of the old congress, the provisions of the constitution, treaties held under the authority of both, and the subsequent legislation thereon, I have followed the rule laid down for my guide by this court, in Foster *vs.* Elam, 2 Peters, 307, in doing it "according to the principles established by the political department of the government. "If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. However individual judges may construe them (treaties), it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed." That the existence of foreign states cannot be known to this court judicially except by some

act or recognition of the other departments of this government is, I think, fully established in the case of Palmer, 3 Wheaton, 634,5; the Pastora, 4 Wheaton, 63; and the Anna, 6 Wheaton, 193.

I shall resort to the same high authority as the basis of my opinion on the powers of the state governments. "By the revolution the duties as well as the powers of government devolved on the people of [Georgia] New Hampshire. It is admitted that among the latter were comprehended the transcendent powers of parliament, as well as those of the executive department." Dartmouth College *vs.* Woodward, 4 Wheat. 451, 4 Wheat. 192; Green *vs.* Biddle, 8 Wheat. 98; Ogden *vs.* Saunders, 12 Wheat. 254, &c. "The same principle applies though with no greater force to the different states of America; for though they form a confederated government, yet the several states retain their individual sovereignties, and with respect to their municipal regulations are to each other foreign." Buckner *vs.* Findley, 2 Peters, 591. The powers of government, which thus devolved on Georgia by the revolution over her whole territory, are unimpaired by any surrender of her territorial jurisdiction, by the old confederation or the new constitution, as there was in both an express saving, as well as by the tenth article of amendments.

But if any passed to the United States by either, they were retroceded by the convention of 1802. Her jurisdiction over the territory in question is as supreme as that of congress over what the nation has acquired by cession from the states or treaties with foreign powers, combining the rights of the state and general government. Within her boundaries there can be no other nation, community, or sovereign power, which this department can judicially recognize as a foreign state, capable of demanding or claiming our interposition, so as to enable them to exercise a jurisdiction incompatible with a sovereignty in Georgia, which has been recognized by the constitution, and every department of this government acting under its authority. Foreign states cannot be created by judicial construction; Indian sovereignty cannot be roused from its long slumber, and awakened to action by our fiat. I find no acknowledgement of it by the legislative or executive power.

Till they have done so, I can stretch forth no arm for their relief without violating the constitution. I say this with great deference to those from whom I dissent; but my judgment tells me, I have no power to act, and imperious duty compels me to stop at the portal, unless I can find some authority in the judgments of this court, to which I may surrender my own.

Indians have rights of occupancy to their lands as sacred as the fee-simple, absolute title of the whites; but they are only rights of occupancy, incapable of alienation, or being held by any other than common right without permission from the government. 8 Wheaton, 592. In Fletcher *vs.* Peck, this court decided that the Indian occupancy was not absolutely repugnant to a seisin in fee in Georgia, that she had good right to grant land so occupied, that it was within the state, and could be held by purchasers under a law subject only to extinguishment of the Indian title. 6 Cranch, 88, 142. 9 Cranch, 11. In the case of Johnson *vs.* M'Intosh, 8 Wheaton, 543, 571, the nature of the Indian title to land on this continent, throughout its whole extent, was most ably and elaborately considered; leading to conclusions satisfactory to every jurist, clearly establishing that from the time of discovery under the royal government, the colonies, the states, the confederacy and this union, their tenure was the same occupancy, their rights occupancy and nothing more; that the ultimate absolute fee, jurisdiction and sovereignty was in the government, subject only to such rights; that grants vested soil and dominion, and the powers of government, whether the land granted was vacant or occupied by Indians.

By the treaty of peace the powers of government and the rights of soil which had previously been in Great Britain, passed definitively to these states. 8 Wheat. 584. They asserted these rights, and ceded soil and jurisdiction to the United States. The Indians were considered as tribes of fierce savages; a people with whom it was impossible to mix, and who could not be governed as a distinct society. They are not named or referred to in any part of the opinion of the court as nations or states, and no where declared to have any national capacity or attributes of sovereignty in their

relations to the general or state governments. The principles established in this case have been supposed to apply to the rights which the nations of Europe claimed to acquire by discovery, as only relative between themselves, and that they did not assume thereby any rights of soil or jurisdiction over the territory in the actual occupation of the Indians. But the language of the court is too explicit to be misunderstood. "This principle was, that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." Those relations which were to subsist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

While the different nations of Europe respected the rights of the natives as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised as a consequence of this ultimate dominion, a power to grant the soil while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian rights of occupancy. The history of America from its discovery to the present day proves, we think, the universal recognition of these principles. 8 Wheat. 574.

I feel it my duty to apply them to this case. They are in perfect accordance with those on which the governments of the united and individual states have acted in all their changes: they were asserted and maintained by the colonies, before they assumed independence. While dependent themselves on the crown, they exercised all the rights of dominion and sovereignty over the territory occupied by the Indians; and this is the first assertion by them of rights as a foreign state within the limits of a state. If their jurisdiction within their boundaries has been unquestioned until this controversy; if rights have been exercised which are directly repugnant to those now claimed; the judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation, or foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government have acted for fifty-five years; and force, by

mere judicial power, upon the other departments of this government and the states of this union, the recognition of the existence of nations and states within the limits of both, possessing dominion and jurisdiction paramount to the federal and state constitutions. It will be a declaration, in my deliberate judgment, that the sovereign power of the people of the United States and union must hereafter remain incapable of action over territory to which their rights in full dominion have been asserted with the most rigorous authority, and bow to a jurisdiction hitherto unknown, unacknowledged by any department of the government; denied by all through all time; unclaimed till now; and now declared to have been called into exercise, not by any change in our constitution, the laws of the union or the states; but pre-existent and paramount over the supreme law of the land.

I disclaim the assumption of a judicial power so awfully responsible. No assurance or certainty of support in public opinion can induce me to disregard a law so supreme; so plain to my judgment and reason. Those, who have brought public opinion to bear on this subject, act under a mere moral responsibility; under no oath which binds their movements to the straight and narrow line drawn by the constitution. Politics or philanthropy may impel them to pass it, but when their objects can be effectuated only by this court, they must not expect its members to diverge from it, when they cannot conscientiously take the first step without breaking all the high obligations under which they administer the judicial power of the constitution. The account of my executorship cannot be settled before the court of public opinion, or any human tribunal. None can release the balance which will accrue by the violation of my solemn conviction of duty.

Mr Justice THOMPSON, dissenting.—Entertaining different views of the questions now before us in this case, and having arrived at a conclusion different from that of a majority of the court, and considering the importance of the case and the constitutional principle involved in it; I shall proceed, with all due respect for the opinion of others, to assign the reasons upon which my own has been formed.

In the opinion pronounced by the court, the merits of the

controversy between the state of Georgia and the Cherokee Indians have not been taken into consideration. The denial of the application for an injunction has been placed solely on the ground of want of jurisdiction in this court to grant the relief prayed for. It became, therefore, unnecessary to inquire into the merits of the case. But thinking as I do that the court has jurisdiction of the case, and may grant relief, at least in part; it may become necessary for me, in the course of my opinion, to glance at the merits of the controversy; which I shall, however, do very briefly, as it is important so far as relates to the present application.

Before entering upon the examination of the particular points which have been made and argued, and for the purpose of guarding against any erroneous conclusions, it is proper that I should state, that I do not claim for this court, the exercise of jurisdiction upon any matter properly falling under the denomination of political power. Relief to the full extent prayed by the bill may be beyond the reach of this court. Much of the matter therein contained, by way of complaint, would seem to depend for relief upon the exercise of political power; and as such, appropriately devolving upon the executive, and not the judicial department of the government. This court can grant relief so far only as the rights of person or property are drawn in question, and have been infringed.

It would very ill become the judicial station which I hold, to indulge in any remarks upon the hardship of the case, or the great injustice that would seem to have been done to the complainants, according to the statement in the bill, and which for the purpose of the present motion I must assume to be true. If they are entitled to other than judicial relief, it cannot be admitted that in a government like ours, redress is not to be had in some of its departments; and the responsibility for its denial must rest upon those who have the power to grant it. But believing as I do, that relief to some extent falls properly under judicial cognizance, I shall proceed to the examination of the case under the following heads.

1. Is the Cherokee nation of Indians a competent party to sue in this court?

2. Is a sufficient case made out in the bill, to warrant this court in granting any relief?

3. Is an injunction the fit and appropriate relief?

1. By the constitution of the United States it is declared (Art. 3, § 2), that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; &c. to controversies between two or more states, &c. and between a state or the citizens thereof; and foreign states, citizens or subjects.

The controversy in the present case is alleged to be between a foreign state, and one of the states of the union; and does not, therefore, come within the eleventh amendment of the constitution, which declares that the judicial power of the United States, shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. This amendment does not, therefore, extend to suits prosecuted against one of the United States by a foreign state. The constitution further provides, that in all cases where a state shall be a party, the supreme court shall have original jurisdiction. Under these provisions in the constitution, the complainants have filed their bill in this court, in the character of a foreign state, against the state of Georgia; praying an injunction to restrain that state from committing various alleged violations of the property of the nation, claimed under the laws of the United States, and treaties made with the Cherokee nation.

That a state of this union may be sued by a foreign state, when a proper case exists and is presented, is too plainly and expressly declared in the constitution to admit of doubt; and the first inquiry is, whether the Cherokee nation is a foreign state within the sense and meaning of the constitution.

The terms *state* and *nation* are used in the law of nations, as well as in common parlance, as importing the same thing; and imply a body of men, united together, to procure their mutual safety and advantage by means of their union. Such a society has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus becomes a moral

person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Vattel, 1. Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states; are to be considered as so many free persons, living together in a state of nature. Vattel 2, § 4. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations. It is sufficient if it be really sovereign and independent: that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state. Vattel, c. 1, pp. 16, 17.

Testing the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion, that they form a sovereign state. They have always been dealt with as such by the government of the United States; both before and since the adoption of the present constitution. They have been admitted and treated as a people governed solely and exclusively by their own laws, usages, and customs within their own territory, claiming and exercising exclusive dominion over the same; yielding up by treaty, from time to time, portions of their land, but still claiming absolute sovereignty and self government over what remained unsold.

And this has been the light in which they have, until recently, been considered from the earliest settlement of the country by the white people. And indeed, I do not understand it is denied by a majority of the court, that the Cherokee Indians form a sovereign state according to the doctrine of the law of nations; but that, although a sovereign state, they are not considered a foreign state within the meaning of the constitution.

Whether the Cherokee Indians are to be considered a foreign state or not, is a point on which we cannot expect to discover much light from the law of nations. We must derive this knowledge chiefly from the practice of our own government, and the light in which the nation has been viewed and treated by it.

That numerous tribes of Indians, and among others the Cherokee nation, occupied many parts of this country long before the discovery by Europeans, is abundantly established by history; and it is not denied but that the Cherokee nation occupied the territory now claimed by them long before that period. It does not fall within the scope and object of the present inquiry to go into a critical examination of the nature and extent of the rights growing out of such occupancy, or the justice and humanity with which the Indians have been treated, or their rights respected.

That they are entitled to such occupancy, so long as they choose quietly and peaceably to remain upon the land, cannot be questioned. The circumstance of their original occupancy is here referred to, merely for the purpose of showing, that if these Indian communities were then, as they certainly were, nations, they must have been foreign nations, to all the world; not having any connexion, or alliance of any description, with any other power on earth. And if the Cherokees were then a foreign nation; when or how have they lost that character, and ceased to be a distinct people, and become incorporated with any other community?

They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and the rights of self government, and become subject to the laws of the conqueror. When ever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according

to existing circumstances; the Indian nation always preserving its distinct and separate national character. And notwithstanding we do not recognize the right of the Indians to transfer the absolute title of their lands to any other than ourselves; the right of occupancy is still admitted to remain in them, accompanied with the right of self government, according to their own usages and customs; and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety. But the principle is universally admitted, that this occupancy belongs to them as matter of right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent; or unless a just and necessary war should sanction their dispossession.

In this view of their situation, there is as full and complete recognition of their sovereignty, as if they were the absolute owners of the soil. The progress made in civilization by the Cherokee Indians cannot surely be considered as in any measure destroying their national or foreign character, so long as they are permitted to maintain a separate and distinct government; it is their political condition that constitutes their *foreign* character, and in that sense must the term *foreign*, be understood as used in the constitution. It can have no relation to local, geographical, or territorial position. It cannot mean a country beyond sea. Mexico or Canada is certainly to be considered a foreign country, in reference to the United States. It is the political relation in which one government or country stands to another, which constitutes it foreign to the other. The Cherokee territory being within the chartered limits of Georgia, does not affect the question. When Georgia is spoken of as a state, reference is had to its political character, and not to boundary; and it is not perceived that any absurdity or inconsistency grows out of the circumstance, that the jurisdiction and territory of the state of Georgia surround or extend on every side of the Cherokee territory. It may be inconvenient to the state, and very desirable, that the Cherokees should be removed; but it does not at all affect the political relation between Georgia and those Indians. Suppose the

Cherokee territory had been occupied by Spaniards or any other civilized people, instead of Indians, and they had from time to time ceded to the United States portions of their lands precisely in the same manner as the Indians have done, and in like manner retained and occupied the part now held by the Cherokees, and having a regular government established there: would it not only be considered a separate and distinct nation or state, but a foreign nation, with reference to the state of Georgia or the United States. If we look to lexicographers, as well as approved writers, for the use of the term *foreign*, it may be applied with the strictest propriety to the Cherokee nation.

In a general sense it is applied to any person or thing belonging to another nation or country. We call an alien a foreigner, because he is not of the country in which we reside. In a political sense we call every country foreign, which is not within the jurisdiction of the same government. In this sense, Scotland before the union was foreign to England; and Canada and Mexico foreign to the United States. In the United States all transatlantic countries are foreign to us. But this is not the only sense in which it is used.

It is applied with equal propriety to an adjacent territory, as to one more remote. Canada or Mexico is as much foreign to us as England or Spain. And it may be laid down as a general rule, that when used in relation to countries in a political sense, it refers to the jurisdiction or government of the country. In a commercial sense, we call all goods coming from any country not within our own jurisdiction foreign goods.

In the diplomatic use of the term, we call every minister a foreign minister who comes from another jurisdiction or government. And this is the sense in which it is judicially used by this court, even as between the different states of this union. In the case of Buckner *vs.* Finlay, 2 Peters, 590, it was held that a bill of exchange drawn in one state of the union, on a person living in another state, was a foreign bill, and to be treated as such in the courts of the United States. The court says, that in applying the definition of a foreign bill, to the political character of the several states of this union, in relation to each other, we are all clearly of opinion,

that bills drawn in one of these states upon persons living in another of them, partake of the character of foreign bills, and ought to be so treated. That for all national purposes embraced by the federal constitution, the states and the citizens thereof are one; united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to, and independent of each other; their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. So in the case of Warder *vs.* Arrell, decided in the court of appeals of Virginia, 2 Wash. 298. The court, in speaking of foreign contracts, and saying that the laws of the foreign country where the contract was made must govern, add; the same principle applies, though with no greater force, to the different states of America: for though they form a confederated government, yet the several states retain their individual sovereignties; and, with respect to their municipal regulations, are to each other foreign.

It is manifest from these cases, that a foreign state, judicially considered, consists in its being under a different jurisdiction or government, without any reference to its territorial position. This is the marked distinction, particularly in the case of Buckner *vs.* Finlay. So far as these states are subject to the laws of the union, they are not foreign to each other. But so far as they are subject to their own respective state laws and government, they are foreign to each other. And if, as here decided, a separate and distinct jurisdiction or government is the test by which to decide whether a nation be foreign or not; I am unable to perceive any sound and substantial reason why the Cherokee nation should not be so considered. It is governed by its own laws, usages and customs: it has no connexion with any other government or jurisdiction, except by way of treaties entered into with like form and ceremony as with other foreign nations. And this seems to be the view taken of them by Mr Justice Johnson in the case of Fletcher *vs.* Peck, 6 Cranch, 146; 2 Peters's Condens. Rep. 308.

In speaking of the state and condition of the different Indian nations, he observes, "that some have totally extinguished their national fire, and submitted themselves to the laws of the states; others have by treaty acknowledged that they hold

their national existence at the will of the state, within which they reside; others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia, among which are the Cherokees. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people: and the uniform practice of acknowledging their right of soil by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their rights of soil."

Although there are many cases in which one of these United States has been sued by another, I am not aware of any instance in which one of the United States has been sued by a foreign state. But no doubt can be entertained that such an action might be sustained upon a proper case being presented. It is expressly provided for in the constitution; and this provision is certainly not to be rejected as entirely nugatory.

Suppose a state, with the consent of congress, should enter into an agreement with a foreign power (as might undoubtedly be done, Constitution, Art. 1, § 10) for a loan of money; would not an action be sustained in this court to enforce payment thereof? Or suppose the state of Georgia, with the consent of congress, should purchase the right of the Cherokee Indians to this territory, and enter into a contract for the payment of the purchase money; could there be a doubt that an action could be sustained upon such a contract? No objection would certainly be made for want of competency in that nation to make a valid contract. The numerous treaties entered into with the nation would be a conclusive answer to any such objection. And if an action could be sustained in such case, it must be under that provision in the constitution which gives jurisdiction to this court in controversies between a state and a foreign state. For the Cherokee nation is certainly not one of the United States.

And what possible objection can lie to the right of the complainants to sustain an action? The treaties made with this nation purport to secure to it certain rights. These are not gratuitous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the

Indians by cession of part of their territory. And if they, as a nation, are competent to make a treaty or contract, it would seem to me to be a strange inconsistency to deny to them the right and the power to enforce such a contract. And where the right secured by such treaty forms a proper subject for judicial cognizance, I can perceive no reason why this court has not jurisdiction of the case. The constitution expressly gives to the court jurisdiction in all cases of law and equity arising under treaties made with the United States. No suit will lie against the United States upon such treaty, because no possible case can exist where the United States can be sued. But not so with respect to a state: and if any right secured by treaty has been violated by a state, in a case proper for judicial inquiry, no good reason is perceived why an action may not be sustained for violation of a right secured by treaty, as well as by contract under any other form. The judiciary is certainly not the department of the government authorised to enforce all rights that may be recognized and secured by treaty. In many instances, these are mere political rights with which the judiciary cannot deal. But when the question relates to a mere right of property, and a proper case can be made between competent parties; it forms a proper subject for judicial inquiry.

It is a rule which has been repeatedly sanctioned by this court, that the judicial department is to consider as sovereign and independent states or nations those powers, that are recognized as such by the executive and legislative departments of the government; they being more particularly entrusted with our foreign relations. 4 Cranch, 241, 2 Peters's Cond. Rep. 98; 3 Wheat. 634; 4 Wheat. 64.

If we look to the whole course of treatment by this country of the Indians, from the year 1775, to the present day, when dealing with them in their aggregate capacity as nations or tribes, and regarding the mode and manner in which all negotiations have been carried on and concluded with them; the conclusion appears to me irresistible, that they have been regarded, by the executive and legislative branches of the government, not only as sovereign and independent, but as foreign nations or tribes, not within the jurisdiction nor under the government of the states within which they were located. This remark is to be

understood, of course, as referring only to such as live together as a distinct community, under their own laws, usages and customs; and not to the mere remnant of tribes which are to be found in many parts of our country, who have become mixed with the general population of the country: their national character extinguished; and their usages and customs in a great measure abandoned; self government surrendered; and who have voluntarily, or by the force of circumstances which surrounded them, gradually become subject to the laws of the states within which they are situated.

Such, however, is not the case with the Cherokee nation. It retains its usages and customs and self government, greatly improved by the civilization which it has been the policy of the United States to encourage and foster among them. All negotiations carried on with the Cherokees and other Indian nations have been by way of treaty with all the formality attending the making of treaties with any foreign power. The journals of congress, from the year 1775 down to the adoption of the present constitution, abundantly establish this fact. And since that period such negotiations have been carried on by the treaty-making power, and uniformly under the denomination of treaties.

What is a treaty as understood in the law of nations? It is an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties. And where is the authority, either in the constitution or in the practice of the government, for making any distinction between treaties made with the Indian nations and any other foreign power? They relate to peace and war; the surrender of prisoners; the cession of territory; and the various subjects which are usually embraced in such contracts between sovereign nations.

A recurrence to the various treaties made with the Indian nations and tribes in different parts of the country, will fully illustrate this view of the relation in which our government has considered the Indians as standing. It will be sufficient, however, to notice a few of the many treaties made with this Cherokee nation.

By the treaty of Hopewell of the 28th November 1785,

1 Laws U. S. 322, mutual stipulations are entered into, to restore all prisoners taken by either party, and the Cherokees stipulate to restore all negroes, and all other property taken from the citizens of the United States; and a boundary line is settled between the Cherokees, and the citizens of the United States, and this embraced territory within the chartered limits of Georgia. And by the sixth article it is provided, that if any Indian, or person residing among them, or who shall take refuge in their nation, shall commit a robbery, or murder, or other capital crime on any citizen of the United States, or person under their protection, the nation or tribe to which such offender may belong shall deliver him up to be punished according to the ordinances of the United States. What more explicit recognition of the sovereignty and independence of this nation could have been made? It was a direct acknowledgement, that this territory was under a foreign jurisdiction. If it had been understood, that the jurisdiction of the state of Georgia extended over this territory, no such stipulation would have been necessary. The process of the courts of Georgia would have run into this as well as into any other part of the state. It is a stipulation analogous to that contained in the treaty of 1794 with England, 1 Laws U. S. 220, by the twenty-seventh article of which it is mutually agreed, that each party will deliver up to justice all persons, who, being charged with murder or forgery committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other. Upon what ground can any distinction be made, as to the reason and necessity of such stipulation, in the respective treaties. The necessity for the stipulation in both cases must be, because the process of one government and jurisdiction will not run into that of another; and separate and distinct jurisdiction, as has been shown, is what makes governments and nations foreign to each other in their political relations.

The same stipulation, as to delivering up criminals who shall take refuge in the Cherokee nation, is contained in the treaty of Holston of the 2d of July 1791, 1 Laws U. S. 327. And the eleventh article fully recognizes the jurisdiction of the Cherokee nation over the territory occupied by them. It provides, that if any citizen of the United States shall go into

the territory belonging to the Cherokees, and commit any crime upon, or trespass against the person, or property of any friendly Indian, which, if committed within the jurisdiction of any state, would be punishable by the laws of such state, shall be subject to the same punishment, and proceeded against in the same manner, as if the offence had been committed within the jurisdiction of the state. Here is an explicit admission that the Cherokee territory is not within the jurisdiction of any state. If it had been considered within the jurisdiction of Georgia, such a provision would not only be unnecessary but absurd. It is a provision looking to the punishment of a citizen of the United States for some act done in a foreign country. If exercising exclusive jurisdiction over a country is sufficient to constitute the state or power so exercising it a foreign state, the Cherokee nation may assuredly with the greatest propriety be so considered.

The phraseology of the clause in the constitution, giving to congress the power to regulate commerce, is supposed to afford an argument against considering the Cherokees a foreign nation. The clause reads thus, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Constitution, Art. 1, § 8. The argument is, that if the Indian tribes are foreign nations, they would have been included without being specially named, and being so named imports something different from the previous term "foreign nations."

This appears to me to partake too much of a mere verbal criticism, to draw after it the important conclusion that Indian tribes are not foreign nations. But the clause affords, irresistibly, the conclusion, that the Indian tribes are not there understood as included within the description, of the "several states;" or there could have been no fitness in immediately thereafter particularizing "the Indian tribes."

It is generally understood that every separate body of Indians is divided into bands or tribes, and forms a little community within the nation to which it belongs; and as the nation has some particular symbol by which it is distinguished from others, so each tribe has a badge from which it is denominated, and each tribe may have rights applicable to itself.

Cases may arise where the trade with a particular tribe may

require to be regulated, and which might not have been embraced under the general description of the term *nation*, or it might at least have left the case somewhat doubtful; as the clause was intended to vest in congress the power to regulate all commercial intercourse, this phraseology was probably adopted to meet all possible cases; and the provision would have been imperfect, if the term *Indian tribes* had been omitted.

Congress could not then have regulated the trade with any particular tribe that did not extend to the whole nation. Or, it may be, that the term *tribe* is here used as importing the same thing as that of *nation*, and adopted merely to avoid the repetition of the term *nation:* and the Indians are specially named, because there was a provision somewhat analogous in the confederation; and entirely omitting to name the Indian tribes, might have afforded some plausible grounds for concluding that this branch of commercial intercourse was not subject to the power of congress.

On examining the journals of the old congress, which contain numerous proceedings and resolutions respecting the Indians, the terms "nation" and "tribe" are frequently used indiscriminately, and as importing the same thing; and treaties were sometimes entered into with the Indians, under the description or denomination of tribes, without naming the nation. See Journals 30th June and 12th July 1775; 8th March 1776; 20th October 1777: and numerous other instances.

But whether any of these suggestions will satisfactorily account for the phraseology here used or not, it appears to me to be of too doubtful import to outweigh the considerations to which I have referred to show that the Cherokees are a foreign nation. The difference between the provision in the constitution and that in the confederation on this subject appears to me to show very satisfactorily, that so far as related to trade and commerce with the Indians wherever found in tribes, whether within or without the limits of a state, was subject to the regulation of congress.

The provision in the confederation, Art. 9, 1 Laws United States, 17, is, that congress shall have the power of regulating the trade and management of all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.

The true import of this provision is certainly not very obvious; see Federalist, No. 42. What were the legislative rights intended to be embraced within the proviso is left in great uncertainty. But whatever difficulty on that subject might have arisen under the confederation, it is entirely removed by the omission of the proviso in the present constitution; thereby leaving this power entirely with congress, without regard to any state right on the subject; and showing that the Indian tribes were considered as distinct communities although within the limits of a state.

The provision, as contained in the confederation, may aid in illustrating what is to be inferred from some parts of the constitution, Art. 1, § 1, par. 3, as to the apportionment of representatives, and acts of congress in relation to the Indians, to wit, that they are divided into two distinct classes. One composed of those who are considered members of the state within which they reside, and the other not: the former embracing the remnant of the tribes who had lost their distinctive character as a separate community, and had become subject to the laws of the states; and the latter such as still retained their original connexion as tribes, and live together under their own laws, usages and customs, and, as such, are treated as a community independent of the state. No very important conclusion I think, therefore, can be drawn from the use of the term "tribe" in this clause of the constitution; intended merely for commercial regulations. If considered as importing the same thing as the term "nation," it might have been adopted to avoid the repetition of the word *nation.*

Other instances occur in the constitution where different terms are used importing the same thing. Thus, in the clause giving jurisdiction to this court, the term "foreign states" is used instead of "foreign nations," as in the clause relating to commerce. And again, in Art. 1, § 10, a still different phrascology is employed. "No state, without the consent of congress, shall enter into any agreement or compact with a 'foreign power.'" But each of these terms, nation, state, power, as used in different parts of the constitution, imports the same thing, and does not admit of a different interpretation. In the treaties made with the Indians, they are sometimes designated under the name of *tribe*, and sometimes that

of *nation*. In the treaty of 1804 with the Delaware Indians, they are denominated the "Delaware tribe of Indians." 1 Laws United States, 305. And in a previous treaty with the same people in the year 1778, they are designated by the name of "the Delaware nation." 1 Laws United States, 302.

As this was one of the earliest treaties made with the Indians, its provisions may serve to show in what light the Indian nations were viewed by congress at that day.

The territory of the Delaware nation was within the limits of the states of New York, Pennsylvania and New Jersey. Yet we hear of no claim of jurisdiction set up by those states over these Indians. This treaty, both in form and substance purports to be an arrangement with an independent sovereign power. It even purports to be articles of confederation. It contains stipulations relative to peace and war, and for permission to the United States troops to pass through the country of the Delaware nation. That neither party shall protect in their respective states, servants, slaves, or criminals, fugitives from the other; but secure, and deliver them up. Trade is regulated between the parties. And the sixth article shows the early pledge of the United States to protect the Indians in their possessions, against any claims or encroachments of the states. It recites, that whereas the enemies of the United States have endeavoured to impress the Indians in general with an opinion that it is the design of the states to extirpate the Indians, and take possession of their country, to obviate such false suggestions; the United States do engage to guaranty to the aforesaid nation of Delawares and their heirs, all their territorial rights, in the fullest and most ample manner, as it has been bounded by former treaties, &c. And provision is even made for inviting other tribes to join the confederacy; and to form a state; and have a representation in congress; should it be found conducive to the mutual interest of both parties. All which provisions are totally inconsistent with the idea of these Indians being considered under the jurisdiction of the states; although their chartered limits might extend over them.

The recital, in this treaty, contains a declaration and admission of congress of the rights of Indians in general, and that the impression which our enemies were endea-

vouring to make, that it was the design of the states to extirpate them and take their lands, was false. And the same recognition of their rights runs through all the treaties made with the Indian nations or tribes, from that day down to the present time.

The twelfth article of the treaty of Hopewell contains a full recognition of the sovereign and independent character of the Cherokee nation. To impress upon them full confidence in the justice of the United States respecting their interest, they have a right to send a deputy of their choice to congress. No one can suppose that such deputy was to take his seat as a member of congress; but that he would be received as the agent of that nation. It is immaterial what such agent is called, whether minister, commissioner or deputy; he is to represent his principal.

There could have been no fitness or propriety in any such stipulation, if the Cherokee nation had been considered in any way incorporated with the state of Georgia, or as citizens of that state. The idea of the Cherokees being considered citizens is entirely inconsistent with several of our treaties with them. By the eighth article of the treaty of the 26th December 1817, 6 Laws U. S. 706, the United States stipulate to give 640 acres of land to each head of any Indian family residing on the lands now ceded, or which may hereafter be surrendered to the United States, who may wish to become citizens of the United States; so also the second article of the treaty with the same nation, of the 10th of March 1819, contains the same stipulation in favour of the heads of families, who may choose to become citizens of the United States; thereby clearly showing that they were not considered citizens at the time those stipulations were entered into, or the provision would have been entirely unnecessary if not absurd. And if not citizens, they must be aliens or foreigners, and such must be the character of each individual belonging to the nation. And it was, therefore, very aptly asked on the argument, and I think not very easily answered, how a nation composed of aliens or foreigners can be other than a foreign nation.

The question touching the citizenship of an Oneida Indian came under the consideration of the supreme court of New

York in the case of Jackson *vs.* Goodel, 20 Johns. 193. The lessor of the plaintiff was the son of an Oneida Indian who had received a patent for the lands in question, as an officer in the revolutionary war; and although the supreme court, under the circumstances of the case, decided he was a citizen, yet chief justice Spencer observed; we do not mean to say that the condition of the Indian tribes (alluding to the six nations), at former and remote periods, has been that of subjects or citizens of the state; their condition has been gradually changing, until they have lost every attribute of sovereignty, and become entirely dependent upon and subject to our government. But the cause being carried up to the court of errors, chancellor Kent, in a very elaborate and able opinion on that question, came to a different conclusion as to the citizenship of the Indian, even under the strong circumstances of that case.

"The Oneidas," he observed, and "the tribes composing the six nations of Indians, were originally free and independent nations, and it is for the counsel who contend that they have now ceased to be a distinct people and become completely incorporated with us, to point out the time when that event took place. In my view they have never been regarded as citizens, or members of our body politic. They have always been, and still are, considered by our laws as dependent tribes, governed by their own usages and chiefs; but placed under our protection, and subject to our coercion so far as the public safety required it, and no farther. The whites have been gradually pressing upon them, as they kept receding from the approaches of civilization. We have purchased the greater part of their lands, destroyed their hunting grounds, subdued the wilderness around them, overwhelmed them with our population, and gradually abridged their native independence. Still they are permitted to exist as distinct nations, and we continue to treat with their sachems in a national capacity, and as being the lawful representatives of their tribes. Through the whole course of our colonial history, these Indians were considered dependent allies. The colonial authorities uniformly negotiated with them, and made and observed treaties with them as sovereign communities exercising the right of free deliberation and action; but, in consideration of protection, owing

a qualified subjection in a national capacity to the British crown. No argument can be drawn against the sovereignty of these Indian nations, from the fact of their having put themselves and their lands under the protection of the British crown: such a fact is of frequent occurrence between independent nations. One community may be bound to another by a very unequal alliance, and still be a sovereign state. Vat. B. 1, ch. 16, § 194. The Indians, though born within our territorial limits, are considered as born under the dominion of their own tribes. There is nothing in the proceedings of the United States during the revolutionary war, which went to impair and much less to extinguish the national character of the six nations, and consolidate them with our own people. Every public document speaks a different language, and admits their distinct existence and competence as nations; but placed in the same state of dependence, and calling for the same protection which existed before the war. In the treaties made with them we have the forms and requisites peculiar to the intercourse between friendly and independent states; and they are conformable to the received institutes of the law of nations. What more demonstrable proof can we require of existing and acknowledged sovereignty."

If this be a just view of the Oneida Indians, the rules and principles here applied to that nation may with much greater force be applied to the character, state, and condition of the Cherokee nation of Indians; and we may safely conclude that they are not citizens, and must of course be aliens: and, if aliens in their individual capacities, it will be difficult to escape the conclusion, that, as a community, they constitute a foreign nation or state, and thereby become a competent party to maintain an action in this court, according to the express terms of the constitution.

And why should this court scruple to consider this nation a competent party to appear here?

Other departments of the government, whose right it is to decide what powers shall be recognized as sovereign and independent nations, have treated this nation as such. They have considered it competent, in its political and national capacity, to enter into contracts of the most solemn character; and if these contracts contain matter proper for judicial inquiry,

why should we refuse to entertain jurisdiction of the case? Such jurisdiction is expressly given to this court in cases arising under treaties. If the executive department does not think proper to enter into treaties or contracts with the Indian nations, no case with them can arise calling for judicial cognizance. But when such treaties are found containing stipulations proper for judicial cognizance, I am unable to discover any reasons satisfying my mind that this court has not jurisdiction of the case.

The next inquiry is, whether such a case is made out in the bill as to warrant this court in granting any relief?

I have endeavoured to show that the Cherokee nation is a foreign state; and, as such, a competent party to maintain an original suit in this court against one of the United States. The injuries complained of are violations committed and threatened upon the property of the complainants, secured to them by the laws and treaties of the United States. Under the constitution, the judicial power of the United States extends expressly to all cases in law and equity, arising under the laws of the United States, and treaties made or which shall be made, under the authority of the same.

In the case of Osborn *vs.* The United States Bank, 9 Wheat. 819, the court say, that this clause in the constitution enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form presented by law. It then becomes a case, and the constitution authorises the application of the judicial power.

The question presented in the present case is, under the ordinary form of judicial proceedings, to obtain an injunction to prevent or stay a violation of the rights of property claimed and held by the complainants, under the treaties and laws of the United States; which, it is alleged, have been violated by the state of Georgia. Both the form, and the subject matter of the complaint, therefore, fall properly under judicial cognizance.

What the rights of property in the Cherokee nation are,

may be discovered from the several treaties which have been made between the United States and that nation between the years 1785 and 1819. It will be unnecessary to notice many of them. They all recognize, in the most unqualified manner, a right of property in this nation, to the occupancy at least, of the lands in question. It is immaterial whether this interest is a mere right of occupancy, or an absolute right to the soil. The complaint is for a violation, or threatened violation, of the possessory right. And this is a right, in the enjoyment of which they are entitled to protection, according to the doctrine of this court in the cases of Fletcher *vs.* Peck, 6 Cranch 87, 2 Peters's Cond. Rep. 308, and Johnson *vs.* M'Intosh, 8 Wheat. 592. By the fourth article of the treaty of Hopewell, as early as the year 1785, 1 Laws United States, 323, the boundary line between the Cherokees and the citizens of the United States within the limits of the United States is fixed.

The fifth article provides for the removal and punishment of citizens of the United States or other persons, not being Indians, who shall attempt to settle on the lands so allotted to the Indians; thereby not only surrendering the exclusive possession of these lands to this nation, but providing for the protection and enjoyment of such possession. And, it may be remarked, in corroboration of what has been said in a former part of this opinion, that there is here drawn a marked line of distinction between the Indians and citizens of the United States; entirely excluding the former from the character of citizens.

Again, by the treaty of Holston in 1791, 1 Laws United States, 325, the United States purchase a part of the territory of this nation, and a new boundary line is designated, and provision made for having it ascertained and marked. The mere act of purchasing and paying a consideration for these lands is a recognition of the Indian right. In addition to which, the United States, by the seventh article, solemnly guaranty to the Cherokee nation all their lands not ceded by that treaty. And by the eighth article it is declared, that any citizens of the United States, who shall settle upon any of the Cherokee lands, shall forfeit the protection of the United States; and the Cherokees may punish them or not as they shall please.

This treaty was made soon after the adoption of the present constitution. And in the last article it is declared that it shall take effect, and be obligatory upon the contracting parties as soon as the same shall have been ratified by the president of the United States, with the advice and consent of the senate; thereby showing the early opinion of the government of the character of the Cherokee nation. The contract is made by way of treaty, and to be ratified in the same manner as all other treaties made with sovereign and independent nations; and which has been the mode of negotiating in all subsequent Indian treaties.

And this course was adopted by president Washington upon great consideration, by and with the previous advice and concurrence of the senate. In his message sent to the senate on that occasion, he states, that the white people had intruded on the Indian lands, as bounded by the treaty of Hopewell, and declares his determination to execute the power entrusted to him by the constitution to carry that treaty into faithful execution; unless a new boundary should be arranged with the Cherokees, embracing the intrusive settlements, and compensating the Cherokees therefor. And he puts to the senate this question: shall the United States stipulate solemnly to guarantee the new boundary which shall be arranged? Upon which the senate resolve, that in case a new, or other boundary than that stipulated by the treaty of Hopewell shall be concluded with the Cherokee Indians, the senate do advise and consent solemnly to guaranty the same. 1 Executive Journal, 60. In consequence of which the treaty of Holston was entered into, containing the guarantee.

Further cessions of land have been made at different times, by the Cherokee nation to the United States, for a consideration paid therefor; and, as the treaties declare, in acknowledgement for the protection of the United States (see treaty of 1798, 1 Laws U. S. 332): the United States always recognizing, in the fullest manner, the Indian right of possession: and in the treaty of the 8th of July 1817, art. 5 (6 Laws U. S. 702), all former treaties are declared to be in full force; and the sanction of the United States is given to the proposition of a portion of the nation to begin the establishment of fixed laws and a regular government: thereby recognizing in the nation a political existence, capable of forming an inde-

pendent government, separate and distinct from and in no manner whatever under the jurisdiction of the state of Georgia; and no objection is known to have been made by that state.

And, again, in 1819 (6 Laws U. S. 748), another treaty is made sanctioning and carrying into effect the measures contemplated by the treaty of 1817; beginning with a recital that the greater part of the Cherokees have expressed an earnest desire to remain on this side of the Mississippi, and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, of the 8th of July 1817, might without further delay be finally adjusted, have offered to make a further cession of land, &c. This cession is accepted, and various stipulations entered into, with a view to their civilization, and the establishment of a regular government, which has since been accomplished. And by the fifth article it is stipulated that all white people who have intruded, or who shall thereafter intrude on the lands reserved for the Cherokees, shall be removed by the United States, and proceeded against according to the provisions of the act of 1802, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." 3 Laws U. S. 460. By this act the boundary lines, established by treaty with the various Indian tribes, are required to be ascertained and marked; and among others, that with the Cherokee nation, according to the treaty of the 2d of October 1798.

It may be necessary here briefly to notice some of the provisions of this act of 1802, so far as it goes to protect the rights of property in the Indians; for the purpose of seeing whether there has been any violation of those rights by the state of Georgia, which falls properly under judicial cognizance. By this act it is made an offence punishable by fine and imprisonment, for any citizen or other person resident in the United States, or either of the territorial districts, to cross over or go within the boundary line, to hunt or destroy the game, or drive stock to range or feed on the Indian lands, or to go into any country allotted to the Indians, without a passport, or to commit therein any robbery, larceny, trespass, or other crime, against the person or property of any friendly

Indian, which would be punishable, if committed within the jurisdiction of any state against a citizen of the United States; thereby necessarily implying that the Indian territory secured by treaty was not within the jurisdiction of any state. The act further provides, that when property is taken or destroyed, the offender shall forfeit and pay twice the value of the property so taken or destroyed. And by the fifth section it is declared, that if any citizen of the United States, or other person, shall make a settlement on any lands belonging or secured, or guarantied, by treaty with the United States to any Indian tribe; or shall survey or attempt to survey, such lands, or designate any of the boundaries, by marking trees or otherwise; such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months.

This act contains various other provisions for the purpose of protecting the Indians in the free and uninterrupted enjoyment of their lands: and authority is given (§ 16) to employ the military force of the United States to apprehend all persons who shall be found, in the Indian country, in violation of any of the provisions of the act; and deliver them up to the civil authority, to be proceeded against in due course of law.

It may not be improper here to notice some diversity of opinion that has been entertained with respect to the construction of the nineteenth section of this act, which declares that nothing therein contained shall be construed to prevent any trade or intercourse with the Indians living on lands surrounded by settlements of citizens of the United States, and being within the ordinary jurisdiction of any of the individual states. It is understood that the state of Georgia contends that the Cherokee nation come within this section, and are subject to the jurisdiction of that state. Such a construction makes the act inconsistent with itself, and directly repugnant to the various treaties entered into between the United States and the Cherokee Indians. The act recognizes and adopts the boundary line as settled by treaty. And by these treaties, which are in full force, the United States solemnly guaranty to the Cherokee nation all their lands not ceded to the United States; and these lands lie within the chartered limits of Georgia: and this was a subsisting guarantee under the

treaty of 1791, when the act of 1802 was passed. It would require the most unequivocal language to authorise a construction so directly repugnant to these treaties.

But this section admits of a plain and obvious interpretation, consistent with other parts of the act, and in harmony with these treaties. The reference undoubtedly is to that class of Indians which has already been referred to, consisting of the mere remnants of tribes, which have become almost extinct; and who have, in a great measure, lost their original character, and abandoned their usages and customs, and become subject to the laws of the state, although in many parts of the country living together, and surrounded by the whites. They cannot be said to have any distinct government of their own, and are within the ordinary jurisdiction and government of the state where they are located.

But such was not the condition and character of the Cherokee nation, in any respect whatever, in the year 1802, or at any time since. It was a numerous and distinct nation, living under the government of their own laws, usages, and customs, and in no sense under the ordinary jurisdiction of the state of Georgia; but under the protection of the United States, with a solemn guarantee by treaty of the exclusive right to the possession of their lands. This guarantee is to the Cherokees in their national capacity. Their land is held in common, and every invasion of their possessory right is an injury done to the nation, and not to any individual. No private or individual suit could be sustained: the injury done being to the nation, the remedy sought must be in the name of the nation. All the rights secured to these Indians, under any treaties made with them, remain unimpaired. These treaties are acknowledged by the United States to be in full force, by the proviso to the seventh section of the act of the 28th May 1830; which declares, that nothing in this act contained shall be construed as authorising or directing the violation of any existing treaty between the United States and any Indian tribes.

That the Cherokee nation of Indians have, by virtue of these treaties, an exclusive right of occupancy of the lands in question, and that the United States are bound under their guarantee, to protect the nation in the enjoyment of such occu-

pancy; cannot, in my judgment, admit of a doubt: and that some of the laws of Georgia set out in the bill are in violation of, and in conflict with those treaties and the act of 1802, is to my mind equally clear. But a majority of the court having refused the injunction, so that no relief whatever can be granted, it would be a fruitless inquiry for me to go at large into an examination of the extent to which relief might be granted by this court, according to my own view of the case.

I certainly, as before observed, do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights, secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.

This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here.

The laws of Georgia set out in the bill, if carried fully into operation, go the length of abrogating all the laws of the Cherokees, abolishing their government, and entirely subverting their national character. Although the whole of these laws may be in violation of the treaties made with this nation, it is probable this court cannot grant relief to the full extent of the complaint. Some of them, however, are so directly at variance with these treaties and the laws of the United States touching the rights of property secured to them, that I can perceive no objection to the application of judicial relief. The state of Georgia certainly could not have intended these laws as declarations of hostility, or wish their execution of them to be viewed in any manner whatever as acts of war; but merely as an assertion of what is claimed as a legal right: and in this light ought they to be considered by this court.

The act of the 2d of December, 1830 is entitled "an act to authorize the governor to take possession of the gold and silver and other mines lying and being in that section of the chartered limits of Georgia, commonly called the Cherokee coun-

try, and those upon all other unappropriated lands of the state, and for punishing persons who may be found trespassing on the mines." The preamble to this act asserts the title to these mines to belong to the state of Georgia; and by its provisions twenty thousand dollars are appropriated, and placed at the disposal of the governor to enable him to take possession of those mines; and it is made a crime, punishable by imprisonment in the penitentiary of Georgia at hard labour, for the Cherokee Indians to work these mines. And the bill alleges that under the laws of the state in relation to the mines, the governor has stationed at the mines an armed force who are employed in restraining the complainants in their rights and liberties in regard to their own mines, and in enforcing the laws of Georgia upon them. These can be considered in no other light than as acts of trespass; and may be treated as acts of the state; and not of the individuals employed as the agents. Whoever authorises or commands an act to be done may be considered a principal, and held responsible, if he can be made a party to a suit: as the state of Georgia may undoubtedly be. It is not perceived on what ground the state can claim a right to the possession and use of these mines. The right of occupancy is secured to the Cherokees by treaty, and the state has not even a reversionary interest in the soil. It is true, that by the compact with Georgia of 1802, the United States have stipulated, to extinguish, for the use of the state, the Indian title to the lands within her remaining limits, "as soon as it can be done peaceably and upon reasonable terms." But until this is done, the state can have no claim to the lands.

The very compact is a recognition by the state of a subsisting Indian right: and which may never be extinguished. The United States have not stipulated to extinguish it, until it can be done "peaceably and upon reasonable terms;" and whatever complaints the state of Georgia may have against the United States for the non-fulfilment of this compact, it cannot affect the right of the Cherokees. They have not stipulated to part with that right; and until they do, their right to the mines stands upon the same footing as the use and enjoyment of any other part of the territory.

Again, by the act of the 21st December 1830, surveyors

are authorized to be appointed to enter upon the Cherokee territory and lay it off into districts and sections, which are to be distributed by lottery among the people of Georgia; reserving to the Indians only the present occupancy of such improvements as the individuals of their nation may now be residing on, with the lots on which such improvements may stand, and even excepting from such reservation improvements recently made near the gold mines.

This is not only repugnant to the treaties with the Cherokees, but directly in violation of the act of congress of 1802; the fifth section of which makes it an offence punishable with fine and imprisonment, to survey or attempt to survey or designate any of the boundaries, by marking trees or otherwise, of any land belonging to or secured by treaty to any Indian tribe: in the face of which, the law of Georgia authorises the entry upon, taking possession of, and surveying, and distributing by lottery, these lands guarantied by treaty to the Cherokee nation; and even gives authority to the governor to call out the military force, to protect the surveyors in the discharge of the duty assigned them.

These instances are sufficient to show a direct, and palpable infringement of the rights of property secured to the complainants by treaty, and in violation of the act of congress of 1802. These treaties and this law, are declared by the constitution to be the supreme law of the land: it follows, as matter of course, that the laws of Georgia, so far as they are repugnant to them, must be void and inoperative. And it remains only very briefly to inquire whether the execution of them can be restrained by injunction according to the doctrine and practice of courts of equity.

According to the view which I have already taken of the case, I must consider the question of right as settled in favour of the complainants. This right rests upon the laws of the United States, and treaties made with the Cherokee nation. The construction of these laws and treaties are pure questions of law, and for the decision of the court. There are no grounds, therefore, upon which it can be necessary to send the cause for a trial at law of the right, before awarding an injunction; and the simple question is, whether such a case is made out by the bill, as to authorize the granting an injunction.

This is a prohibitory writ, to restrain a party from doing a wrong or injury to the rights of another. It is a beneficial process, for the protection of rights; and is favourably viewed by courts of chancery, as its object is to prevent rather than redress injuries; and has latterly been more liberally awarded than formerly. 7 Ves. Jun. 307.

The bill contains charges of numerous trespasses by entering upon the lands of the complainants and doing acts greatly to their injury and prejudice, and to the disturbance of the quiet enjoyment of their land, and threatening a total destruction of all their rights. And although it is not according to the course of chancery, to grant injunctions to prevent trespasses when there is a clear and adequate remedy at law, yet it will be done when the case is special and peculiar, and when no adequate remedy can be had at law, and particularly when the injury threatens irreparable ruin. 6 Ves. 147. 7 Eden, 307. Every man is entitled to be protected in the possession and enjoyment of his property; and the ordinary remedy by action of trespass may generally be sufficient to afford such protection. But, where from the peculiar nature and circumstances of the case, this is not an adequate protection, it is a fit case to interpose the preventive process of injunction. This is the principle running through all the cases on this subject, and is founded upon the most wise and just considerations; and this is peculiarly such a case. The complaint is not of a mere private trespass, admitting of compensation in damages; but of injuries which go to the total destruction of the whole right of the complainants. The mischief threatened is great and irreparable. 7 Johns. Cha. 330. It is one of the most beneficial powers of a court of equity to interpose and prevent an injury, before any has actually been suffered; and this is done by a bill, which is sometimes called a bill quia timet. Mitford, 120.

The doctrine of this court in the case of Osborne *vs.* The United States Bank, 9 Wheat. 338, fully sustains the present application for an injunction. The bill in that case was filed to obtain an injunction against the auditor of the state of Ohio, to restrain him from executing a law of that state, which was alleged to be to the great injury of the bank, and to the destruction of rights conferred by their charter. The only

question of doubt entertained by the court in that case was, as to issuing an injunction against an officer of the state to restrain him from doing an official act enjoined by statute, the state not being made a party. But even this was not deemed sufficient to deny the injunction. The court considered that the Ohio law was made for the avowed purpose of expelling the bank from the state, and depriving it of its chartered privileges: and they say, if the state could have been made a party defendant, it would scarcely be denied, that it would be a strong case for an injunction; that the application was not to interpose the writ of injunction, to protect the bank from a common and casual trespass of an individual, but from a total destruction of its franchise, of its chartered privileges, so far as respected the state of Ohio. In that case, the state could not be made a party according to the eleventh amendment of the constitution; the complainants being mere individuals and not a sovereign state. But, according to my view of the present case, the state of Georgia is properly made a party defendant; the complainants being a foreign state.

The laws of the state of Georgia in this case go as fully to the total destruction of the complainants' rights as did the law of Ohio to the destruction of the rights of the bank in that state; and an injunction is as fit and proper in this case to prevent the injury, as it was in that.

It forms no objection to the issuing of the injunction in this case, that the lands in question do not lie within the jurisdiction of this court. The writ does not operate in rem, but in personam. If the party is within the jurisdiction of the court, it is all that is necessary to give full effect and operation to the injunction; and it is immaterial where the subject matter of the suit, which is only affected consequentially, is situated. This principle is fully recognized by this court in the case of Massie *vs.* Watts, 6 Cranch, 157; when this general rule is laid down, that in a case of fraud of trust or of contract, the jurisdiction of a court of chancery is sustainable, wherever the person may be found, although lands not within the jurisdiction of the court may be affected by the decree. And reference is made to several cases in the English chancery recognizing the same principle. In the case of Penn *vs.* Lord Baltimore, 1 Ves. 444, a specific performance of a con-

tract respecting lands lying in North America was decreed; the chancellor saying, the strict primary decree of a court of equity is in personam, and may be enforced in all cases when the person is within its jurisdiction.

Upon the whole, I am of opinion,

1. That the Cherokees compose a foreign state within the sense and meaning of the constitution, and constitute a competent party to maintain a suit against the state of Georgia.

2. That the bill presents a case for judicial consideration, arising under the laws of the United States, and treaties made under their authority with the Cherokee nation, and which laws and treaties have been, and are threatened to be still further violated by the laws of the state of Georgia referred to in this opinion.

3. That an injunction is a fit and proper writ to be issued, to prevent the further execution of such laws, and ought therefore to be awarded.

And I am authorised by my brother Story to say, that he concurs with me in this opinion.

APPENDIX, No. I.

THE following is one of the opinions referred to by Mr Wirt in his argument: being the opinion of CHANCELLOR KENT, on several questions propounded to him on behalf of the Cherokee nation of Indians.

The following questions have been submitted to me by or on behalf of the Cherokee nation of Indians, for my opinion thereon, as counsel.

1. Is the act of the legislature of Georgia of the 19th of December 1829, which "adds the territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall, and Habersham, and extends the laws of the state over the same, and annuls all laws and ordinances made by the Cherokee nation of Indians;" a valid and constitutional act, within the purview of the constitution and laws of the United States?

2. If not constitutional, can the Cherokee nation of Indians maintain a suit founded on its violation of their rights, against the state of Georgia, in the supreme court of the United States: and can the court, upon the institution of such suit, lawfully inforce by process of injunction, the officers of Georgia from the execution of that law?

3. Is the construction given by the president of the United States to the treaties existing between the United States and the Cherokee nation of Indians, binding and conclusive upon the supreme court?

4. If the Cherokees be not a foreign state, in the sense of the constitution; can John Ross, as the principal chief of the Cherokee nation of Indians, and duly authorised by them to represent them and their rights in the supreme court, be enti-

tled to sue out from the circuit court of the United States, process of injunction against the officers of Georgia acting in execution of the said law?

5. Can any individual of the Cherokee nation of Indians, personally affected in his rights by the operation and execution of the said law, sue out such process, or maintain a suit in the circuit court of the United States for the district of Georgia, for a personal injury produced in the execution of the act of Georgia?

6. Has the supreme court appellate jurisdiction under the twenty-fifth section of the judiciary act of congress, in the case of a decision in the highest court of law and equity in Georgia, under the said act, in favour of its validity, as against the constitution and laws of the United States?

I shall consider the questions in the order in which they have been stated.

The act of the legislature of the state of Georgia, on which the first question arises, divides the Indian territory lying within its chartered limits into five parts by metes and bounds, and annexes the parts respectively to the five counties mentioned in the act. It then goes on and declares that all the laws both civil and criminal of the state are extended over the portions of territory respectively; and that all persons residing within the same, shall, after the 1st day of June 1830, be subject to the operations of the laws, in the same manner as other citizens; that all laws, ordinances, orders and regulations of any kind whatever, made, passed or enacted by the Cherokee nation of Indians, in any way whatever, or by any authority whatever of said tribe, are null and void, and of no effect, as if the same had never existed; and that it shall not be lawful for any defendant to justify under the same, or give the same in evidence on the trial of any suit whatever: that it shall not be lawful for any person under colour of any rule, ordinance, law or custom of the Cherokee nation, to prevent or offer to prevent any Indian residing within the chartered limits of the state, from selling or ceding to the United States, for the use of the state of Georgia, the whole or any part of the said territory; and any person offending therein, shall be deemed guilty of a high misdemeanour The act provides

for the service of process in the Indian territory; and it has some other mandatory and penal provisions in furtherance of the general object of the law; and it concludes with declaring that no Indian or descendant of any Indian, residing with the Cherokee nation, shall be deemed a competent witness in any court of the state to which a white person may be a party, except such white person reside in the Cherokee nation.

This act will in its operation go to the entire destruction of the Cherokees in their national capacity. It annihilates all the rights, privileges, powers and relations, which they had before enjoyed as a distinct and independent community. As a consequence of the annihilation of the Cherokee nation, the act of Georgia, by necessary implication, abrogates all the treaties, laws and ordinances of the United States, applicable to that nation. It is an act of most momentous import, not only to the Cherokees, but to the people of this country; inasmuch as the authority which it assumes and the precedent which it establishes, affects the character of the national government, and the stability of its treaties with all the various nations of Indians throughout the United States.

The Cherokee nation whom this act of the state of Georgia thus destroys, had existed from time immemorial as a separate tribe, in the exercise of the power of self government, and with the attributes of a nation competent to make treaties, and to maintain the customary relations of war and peace. The Cherokees had been constantly recognized in their national character by the British and colonial authorities prior to our revolution. The same character was conceded to them by the government of the United States ever since we became an independent nation. This appears by a reference to the public documents, laws and treaties of the union. But the discussions on this subject both in and out of congress within the last twelve months, have been so full and ample, and are so universally known, that I need only allude to the prominent transactions in support of this historical fact.

I begin with the commencement of our history as a nation.

From the first formation of the union and prior to the adoption of the articles of confederation, congress treated with the Indians spread over every part of the country covered by the colonial charters, as separate and independent nations. They sought peace and friendship with them on the footing

of distinct powers; and appointed commissioners for the three Indian departments, to treat with them in the name and on the behalf of the united colonies. The Cherokees were mentioned as included in the southern department; and the language of congress and their dealings towards any one of the Indian nations is, in reference to their national character, equally applicable to all of them. Congress addressed the Delawares and the chiefs of the six confederate nations as *Brethren and Friends;* and besought them to preserve *neutrality* in the war between the colonies and England, as a matter in which they had no concern. This was in the year 1775. Journals of Congress, vol. 1, July 13th and December 16th 1775.

In 1776 congress undertook to regulate trade with the Indians, and to prevent any "unjust advantage of their distress and intemperance;" and to declare that no trader should go into the Indian territories without license. They resolved that no Indians should be employed as soldiers in the united colonies, without the consent of the tribes to which they belong, given "in a national council held in the customary manner:" and that disputes between the white people and Indians in their dealings should be determined by arbitrators fairly chosen, "if the Indians would consent." They admitted Indian chiefs to an audience, and declared, that, being "delegates of the thirteen united colonies, they were pleased to see them." In their addresses to the chiefs of the Six Nations and of the Delawares and Shawanese; they declare their wish for a peace and friendship with them that may last for ever, and also with "our brethren of every other Indian nation."

They desire to see some of the wise men of the Indians at their great council fire, and which congress declare they preserve "bright and clear for all nations."

They admonish the Indians that "their safety as nations depended on their preserving peace and friendship with the white people of this island;" they declare that they will take all the care in their power that no interruption or disturbance be given to their security and settlement; and that none of the white people should be "suffered by force or fraud to deprive them of any of their land, or to settle them without a fair purchase, and their free consent." Congress in particu-

lar guarantied to the Delawares all their territorial rights in the most ample manner as bounded by former treaties. Journals of Congress, vol. 2, January 7—27, March 8, April 10 and 29, May 27, June 11, August 19, September 19, and December 7, 1776.

The Cherokees having in the year 1776 committed hostilities on the state of South Carolina, congress in 1777 informed the Six Nations that they had carried the war into the country of the Cherokees and fought them, and that they had repented and congress had forgiven them; and they then assure their "brothers of the Six Nations" that they and we "ought to be one people, always ready to assist and serve each other." Journals of Congress, vol. 3, December 2, 1777. In January 1778 and 1779 congress, in reference to the Six Nations, declared that those "Indian nations had *waged an unprovoked and cruel war against the United States.*" They direct an inquiry whether certain Seneca chiefs came among them "as representatives or ambassadors of the Seneca nations," and that though they were disposed to peace with the savages, yet "it must be supplicated on the part of the *enemy.*"

Such was the uniform language and conduct of the congress of the United States towards the Indian nations, prior to the final ratification of the articles of confederation. They declared themselves to be invested with the supreme sovereign power of war and peace, and with the power of executing the law of nations. Journals of Congress, vol. 5, March 6, 1779. These articles prohibited the states from engaging "in any war without the consent of congress; unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state." The articles gave to congress, what indeed they had before asserted, the full and exclusive right and power of determining on war and peace, and entering into treaties and alliances; and also the exclusive power of "regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated." Art. 6 and 9.

Under the confederation, congress continued to treat and deal with the Indians *within the chartered limits of the*

states as distinct, independent nations; and as possessing the sole and exclusive right to protect them, and maintain political relations with them. In 1781, they sanction a negotiation for a treaty of peace with the Cherokees and Chickasaw Indians, as being means "to put a stop to the ravages of *those nations.*" Journals of Congress, vol. 7, 168.

On the 21st of January 1785, congress made a treaty with the Wyandot, Delaware, Chippewa, and Ottawa nations of Indians, and gave them peace. They had previously declared in 1783, that they *waved the right of conquest* over the northern and western nations of Indians. These Indian nations "acknowledged themselves and all their tribes to be under the protection of the United States, *and of no other foreign sovereign whatever.*" It was stipulated that if any person, not being an Indian, should attempt to settle on any of the lands allotted to the Wyandot and Delaware nations, he should *forfeit the protection* of the United States, and the *Indians might punish him as they pleased;* and if any Indian should commit robbery or murder on any citizen of the United States, his tribe should be bound *to deliver him up to the United States to be punished.* A treaty of similar import and provisions was made the 31st January 1786 with the Shawanoe nation of Indians. Journals of Congress, vol. 10, 138; vol. 11, 39.

On the 28th November 1785, the first important treaty was made by the United States with the Cherokees at Hopewell. The treaty declared that the *United States* gave peace to all the Cherokees, and received them *into the favour and protection of the United States.* The Indians acknowledged all the Cherokees to be under the protection of the United States, and *of no other sovereign whatever.*

The treaty goes on and describes the boundaries to the hunting grounds between the said Indians and the citizens of the United States, *within the limits of the United States;* and it provides for a mutual exchange of prisoners, and for the surrender of Indians committing capital crimes upon citizens; and stipulates to punish offences against Indians equally as if committed against citizens. The treaty provides, that if any citizen should attempt to settle upon the lands allotted to the Indians, he should forfeit the *protection of the United States,*

and the Indians might punish him as they pleased. Punishment of the innocent, under the idea of retaliation, is disallowed to either side, except where there is manifest violation of the treaty; and then it shall be preceded by a demand of justice, and, if refused, by a *declaration of hostilities.* The treaty finally provides, that the Cherokees shall have the right to send a deputy to congress whenever they think fit.

Similar treaties were made in the January following with the Chickasaw and Choctaw nations of Indians, and they were all directed to be formally entered upon the journals of congress. Journals of Congress, vol. 11.

Afterwards, in 1786, congress resolved that no citizen or other person should reside among, or trade with the Indians within the territory of the United States without a license; and that it was requisite that a good correspondence be maintained between the citizens of the United States and the *several nations of Indians in amity with them.* In 1788, congress, by proclamation, declared their determination to protect the Cherokees in their rights under the above treaty, and to employ force, if requisite, to drive off intruders upon their lands and hunting grounds. Journals of Congress, vol. 11, 127; vol. 13, 93.

Georgia had been a member of the union from July 1775, and was equally bound with the other states of the confederacy to all these acts, resolutions, and treaties of the federal head. There had been a question raised by the states of North Carolina and Georgia respecting the construction of the sixth article of the confederation, giving to congress the right *to regulate trade and manage affairs with the Indians.* The article had been differently construed by congress and these two states, and the latter had actually pursued measures in conformity to their own construction: for North Carolina had undertaken to assign lands to the Cherokees, and Georgia had proceeded to treat with the Creeks concerning peace and concerning their lands. The report of a committee of congress on Indian affairs, consisting of a member from the states of Massachusetts, New York, Pennsylvania, Delaware, and Virginia, had been made in 1787, in which it was stated, that encroachments and settlements had been made upon the lands of the Creek and Cherokee nations by the people of Georgia

and North Carolina, under various pretences; which the Indians, *tenacious of their rights*, were determined to oppose.

The report took notice of the question, and of the construction set up, and the acts done under it by the two states; and it declared, that if the construction of those states was right, it would leave the federal powers in this respect a mere nullity. The report contained a clear and forcible train of reasoning in support of the construction uniformly given by congress to that article of the confederation. It was observed, that in forming the clause in the articles of confederation, the parties to the federal compact must have had some definite objects in view; and that it had long been an opinion in this country, supported by justice and humanity, that the Indians had just claims to all lands occupied by, and not fairly purchased from them; and that in *managing affairs with the independent tribes within the limits of the states*, the principal objects had been those of *making peace and war*, purchasing certain tracts of their lands, fixing boundaries between *them and our people*, and preventing the latter settling on lands in possession of the former. That the powers necessary to these objects appeared to be *indivisible*, and that the parties must have intended to give them entire to the union, or else entire to the states. These powers, before the revolution, were possessed by the king and exercised by him; nor did they interfere with the legislative right of the colony within its limits. That the distinction then, and still, taken was, that the *laws of the state could have no effect upon a tribe of Indians on their lands within the limits of a state*, so long as the tribe was *independent*, and not a member of the state; and therefore the union might make stipulations with any such tribe without infringing upon the legislative right in question. The Indian tribes were justly considered the *common friends or enemies of the United States*, and no particular state could have any exclusive interest in the management of affairs with any of the tribes. Journals, vol. 12, 82.

Thus stood our relations with the Indians at the time of the adoption of the present constitution of the United States. Though the sixth article in the old confederation relative to the Indians was not free from difficulty and apparent inconsistency (and for which we have the high authority of the

Federalist), yet the practical construction given to it by the United States, and generally acquiesced in by the individual states, became authoritative and conclusive.

By Indians, *not members of any state*, were intended all those tribes which remained upon their own territory, and in the exercise of their original independence; notwithstanding their lands were included within the chartered limits of the colonies, and in some instances nearly surrounded by white settlements. It is well known that the colonies claimed under their charters to an indefinite extent, and covered *all the Indian territories within the United States:* and the clause in question in the articles of confederation, must have had reference to Indians *within the chartered limits of the states*, who were not at the same time members of the state, nor subject to its municipal jurisdiction. Under any other construction, the clause would have been inoperative, repugnant, and void.

But the constitution of the United States put an end to all this difficulty, by dropping the obnoxious proviso, and vesting in the government the exclusive power to declare war, to make treaties, and to regulate commerce with the Indian tribes. No state can enter into any treaty, agreement or compact with a foreign power.

In pursuance of these general powers, congress, as early as July 1790, passed a law *to regulate trade and intercourse with the Indian tribes;* and it prohibited all trade and intercourse with them without a license under the authority of the United States, and declared void all sales of lands by any tribe or nation of Indians within the United States, to any person *or state*, except under the like authority.

The commission of any crime or trespass relating to the person or property of any friendly Indian, upon the territory of the Indians; was made punishable in like manner as if committed against a citizen within the jurisdiction of the state or district. The United States also made a treaty with the Creeks on the 7th of August 1790, in which they dealt with them on the footing of a sovereign power.

The United States solemnly guarantied to the Creek Nation all their lands on one side of a prescribed boundary; and agreed, that if any citizen should attempt to settle on the Indian lands he forfeited the protection of the United States; and the

Creeks might punish him as they pleased. Reprisals for violence committed on person or property were not permitted on either side, until satisfaction had been demanded and refused.

A similar treaty was made with the Cherokees at Holston on the 2d July 1791, and it declared that there should be perpetual peace and friendship *between all the citizens of the United States, and all the individuals composing the Cherokee nation.* The Cherokees acknowledged the nation to be under the protection of the United States, and of *no other sovereign;* and stipulated not to hold any treaty with any foreign power *or individual state,* and to allow to the United States the sole and exclusive right of regulating their trade. They stipulate to allow to the citizens of the United States the free use of a road from Washington to Mero district, and the navigation of the Tennessee river. The United States on their part not only recognize the efficacy of these concessions on the part of the Indians, by being parties to the treaty; but they solemnly *guaranty to the Cherokee nation all their lands not thereby ceded,* and agreed that no citizen should hunt or destroy game on the Cherokee lands, or go into their country without a passport.

This treaty, like all other public treaties, was ratified by the president and senate, and became thence forward the supreme law of the land.

It is difficult to conceive of any political transaction, which could carry with it more explicit and conclusive evidence of the recognition, on the part of the United States, of the competence of the Cherokees to treat and act as a sovereign and independent nation: a nation willingly placed at the same time under our protection, and qualifying their sovereignty in some degree for the sake of friendship and security, according to the usage of nations where the strong and the weak are placed side by side.

Treaties of the same import and effect were not only made from time to time with various other tribes of Indians, but with the same Cherokee nation in 1792, 1794, 1798, 1803, 1804, 1805, 1806, 1807, 1816, 1817, and 1819.

In that of 1817, it was declared, that the upper part of the Cherokee nation wished to remain and engage in

the pursuits of agriculture and a civilized life, and to *begin the establishment of fixed laws, and a regular government;* and that the lower Cherokees wished to pursue the hunter life and emigrate beyond the Mississippi. The treaty contained cessions which fell to Georgia and Alabama; and it declared *that the treaties heretofore made between the Cherokee nation and the United States, were to continue in full force with both parts of the nation.*

In the last treaty, in 1819, large cessions of lands were made to the United States, and falling within the limits of the states of Georgia, Alabama, and Tennessee. The preamble to it recited, that the greater part of the Cherokee nation had an earnest desire to remain on this side of the Mississippi, and *to commence those measures which they deemed necessary to the civilization and preservation of the nation.* Intruders from the white settlements were to be removed by the United States, under the act of congress of the 30th March 1802.

I have now alluded to the principal documentary testimony: and from which I conclude that the Cherokee nation of Indians are an independent people, placed under the protection of the United States; and entitled to the privilege of self government within their own territory; and to the exclusive use, enjoyment and government of their laws, except so far as those rights have not been expressly surrendered or modified by treaty.

The United States have repeatedly dealt with them upon equal terms as a sovereign power, and pledged the national faith for their protection as a nation, in their rights and property, under the stipulations contained in the various treaties. The act of congress of the 30th of March 1802 remains still in force; and that act renders it unlawful for any citizen to enter upon any Indian territory to hunt or destroy their game; or to drive or convey away their stock of horses and cattle; or range on any lands allotted or secured to them by treaty; or to commit thereon any crime or trespass upon their persons or property; or to make any settlement upon any of their lands; or survey or attempt to survey the same; or to reside in any Indian town or settlement, as a trader, without license. All conveyances of land from any Indian nation

or tribe within the bounds of the United States, are declared to be invalid, unless made by treaty, pursuant to the constitution and under the authority of the United States. That statute described the boundary line as established by treaty between the United States and various Indian tribes; and it included, as being within Indian territory, the lands now claimed by Georgia and occupied by the Cherokees. The act of the 3d of March 1817, relative to the punishment of crimes and offences committed within the Indian boundaries, declared that the act was not to extend to any offence committed *by one Indian against another within any Indian boundary.*

The territory and sovereignty of the Cherokees have been transmitted to them from their ancestors. They have been in the enjoyment of both, from the first settlement of Georgia; with the approbation of the whites, and without any known conflicting claim against them. No better right or title to territory and national sovereignty can exist, either by the law of nature or nations. They have never been conquered. The United States have been engaged in war with them; but they never claimed either the territory or sovereignty of the Cherokees as conquerors. They have disclaimed any such pretension; and have made many treaties of peace and friendship with the Cherokees. Their sovereignty now rests upon the public conventional law of the union.

The chartered limits of the individual states have never been construed by the United States, in any period of its history, to confer jurisdiction over territories contained within those limits; and claimed, defined, and occupied, not by wandering savages, as in New South Wales, but by tribes of Indians acting regularly in a national capacity.

The chartered limit gave only a right of preemption of the soil after the Indian title had been fairly extinguished; with the consent of the tribe given in a national capacity, and negotiated under the authority of the United States. The chartered limit and claim were subordinate to the Indian title and sovereignty, and conferred no jurisdiction repugnant thereto. This seems to be the true and acknowledged doctrine; for it is supported by all the acts of government, and by the authority and sanction of our most distinguished statesmen.

[The Cherokee Nation *vs.* The State of Georgia.]

As between the crown and its subjects, before the revolution, and as between the state and its citizens, since our independence; the theory is different, so far as that *the seisin* of the government, under its national boundary or chartered limits, cannot be permitted to be drawn in question. But this fiction of law, and this seisin, have never been put forward (except it be recently by Georgia), to any Indian nation, as giving any right or title to their territory, *other than the right of preemption as against other civilized nations.*

The act of the legislature of New York, in 1822 (and which has recently been incorporated into the new revised statute code), asserting exclusive criminal jurisdiction over the Senecas and other tribes of Indians within the limits of the states, even as to crimes and offences committed by Indians against each other, *upon their own territory*, is to be cited as an anomalous case; which cannot easily be reconciled to sound principles, or to the authority of the act of congress of 1802, or to the treaties made with the Six Nations. It cannot be justified, unless it be upon the ground that the Indians in New York have ceased, by their paucity of numbers and by their insignificance, to exist in a distinct national capacity, regularly exercising self government.

This may, perhaps, be the case with the Mohawks, Tuscaroras, Onondagas, and Cayugas, but I think it could not be so with the Senecas; and the act was carried to an unjustifiable extent upon strict principles of national law. It came incidentally into view in the case of Goodell *vs.* Jackson 20 Johns. Rep. 716; and it was supposed, in the opinion then delivered in the court of errors, to be warranted upon principles of necessity and humanity, and to prevent gross and barbarous punishments in the presence of our own mild and Christian people. But these principles will not sustain it when tested by the laws and treaties of the United States; and however just and meritorious the intention of the law giver was, in that particular case, I am now satisfied, upon a more thorough consideration of the subject, that the statute alluded to could not endure a judicial scrutiny, if the constitution, laws and treaties of the union were brought to bear against it.

The compact made between the United States and the state of Georgia, the 24th of April 1802, does not appear to me to

affect the present question. In that contract the United States engaged to extinguish, for the use of Georgia, as *early as the same could be peaceably obtained on reasonable terms*, the Indian title to the county of Talassee, and to all the other lands within the state of Georgia; and the United States ceded to Georgia all her claim to the jurisdiction and soil of any lands within the chartered limits of Georgia, and east of the line between Alabama and Georgia. This compact could not impair the national character or rights of the Cherokees, who were no parties to it; nor oblige them to part with any portion of their territory without their free and fair consent.

But this act of cession on the part of Georgia contains a strong affirmative argument in favour of the Indian claims, and a sanction of their rights by Georgia herself.

The cession is made by the state of Georgia to the jurisdiction and soil of the Indian lands, within the chartered limits of Georgia, lying west of the Catahouchee river, comprising most part of the territory of the present states of Alabama and Mississippi; and it was made upon the express condition, not only that the United States should extinguish the Indian title to the lands lying within the state of Georgia in the manner above mentioned, but that the ceded territory should form a state, and be admitted into the union "on the same conditions and restrictions, with the same privileges, and in the same manner," as was provided by the ordinance of congress of 13th July 1787, with the exception only of the article which forbids slavery. Now, if we turn to the ordinance to which the high contracting parties had reference, we find, that, by the third article, the following provision is declared among others to be one of the articles of compact between the original states, and the people and states in the said territory (being the territory of the United States north west of the river Ohio), and for ever to remain unalterable. The provision is as follows, to wit, "the utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being

done to them, and for preserving peace and friendship with them."

This compact, with these provisions incorporated in this manner into it, was ratified by the legislature of Georgia June 16th, 1802; and it would appear to follow that the state of Georgia is *estopped* by her solemn and deliberate act, done in the face of the union, from questioning the rights and liberties of the Cherokees, as now by them declared and asserted.

My opinion on the first question accordingly is, that the act of Georgia is repugnant to the treaties made between the United States and the Cherokees, and to the act of congress of 1802 regulating intercourse with the Indian tribes, and to the constitution of the United States authorizing that act and those treaties: and the conclusion appears to me to follow, that it is an unconstitutional act, and one which the courts of justice of the United States would not sustain. I give this opinion with diffidence, because I know it to be arrayed against very high and distinguished authority: but it is nevertheless founded on my clear and decided convictions, and it is called for in the course of my professional duty, and under circumstances in which I do not feel at liberty to withhold it.

The second question stated to me is, whether the Cherokees can maintain a suit in the supreme court of the United States against the state of Georgia, founded on a violation of their rights under the operation of the act of that state; and whether process of injunction could issue in that case to stay the execution of the statute?

The judicial power of the United States undoubtedly reaches the case; for it "extends to all cases in law and equity under the constitution, the laws and treaties of the union."

But the great question is, whether the supreme court possesses *original* jurisdiction, so as to sustain a suit commenced there by the Cherokee nation in the name of "the head men and warriors of all the Cherokees" against the state of Georgia. The judicial power extends originally to controversies "between a state, and foreign states, citizens or subjects." In those cases in which "a state shall be a party," the supreme court had, and still has original jurisdiction. But by the amend-

ment to the constitution, the judicial power does not extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, "or by citizens or subjects of any foreign state:" leaving thereby the judicial power as it originally stood in respect to "controversies between a state and foreign states."

The new inhibition to sue a state, only applies to the citizens or subjects of foreign states; and does not extend to the foreign state itself.

The case would appear then to resolve itself into the single point, whether the Cherokee nation of Indians be a *foreign state*, within the purview of the judicial branch of the constitution of the United States; and can a foreign state sue one of the United States.

There is no difficulty, as the case appears to me, in declaring the Cherokees to be *a state*, within the meaning of the term used in that part of the constitution. A state means a complete or self sufficient body of persons, united together in one community for the defence of their own rights, and to do right to foreigners. Every state has "its affairs and interests; it deliberates and takes resolutions in common, and becomes a moral person having an understanding and a will peculiar to itself: and is susceptible of obligations and laws." This definition of a state or body politic is independent of the particular form of its government, and applies equally to every people who act for themselves, whatever may be the structure of their civil policy, or into whatever hands they may deposit their sovereign power. Grotius, b. 1, c. 1, § 14. Ibid. b. 3, c. 3, § 2. Burlemaqui, vol. 2, part 1, ch. 4, § 9. Vattel, b. 1, ch. 1.

It would appear to me that the Indian nations are to be considered not only as states, but as *foreign* states; because they do not constitute any ingredient or essential part of our own body politic.

Every other state or body politic, not within the action of the will and power of our government, legally speaking stands in a *foreign* relation to it; and relatively considered must be a foreign power. Foreign states, foreign powers, foreign nations, are terms in the constitution of plain and familiar import;

and mean states and powers not within the *domestic* compact, nor subject to its control. It is best and safest to give to such words, which are not strictly technical, their plain and popular meaning. We are most likely in that way, and with that rule of interpretation, to arrive at the intention of the instrument. The Indian powers fall within the ordinary acceptation of the term, foreign states. They do not constitute part and parcel of our internal or domestic government. They are foreign to us in point of fact, for we have uniformly dealt with them as independent and alien powers. The laws and treaties which we have been considering abundantly establish this fact. They are foreign states in the purview of national law; for they have the essential attributes of nations, and make war and peace, and negotiate and establish treaties, and contract alliances in the style and solemnity, and efficacy of independent states.

If one of the United States violates the treaties of the nation made with the Indian tribes, or the security afforded to them under the intercourse act of 1802, by attacking their national privileges and their rights of property, there must be a civil remedy within the contemplation of law; or the government would be lamentably imperfect in its organization and competence. It would be destitute of the ordinary means of self-preservation.

The grievance appears to constitute a case falling within the reason of the constitutional jurisdiction given to the judicial power. It involves the peace of the union, and implicates its faith and character.

The national government cannot vindicate its authority over a member, in any way so conciliatory and so effectual, as by the gentle interposition and reasoning powers of the courts of justice. The constitution evidently intended to reach and cover all controversies between two or more states, or between one of them and a foreign state, by this pacific and impartial mode of adjustment; and controversies between the states and Indian tribes are within the reason and policy of the provision.

I do not perceive any objection to the construction which I now assume, arising from that part of the constitution which gives power to congress to "regulate commerce with foreign

nations, and among the several states, and with the Indian tribes."

If the Indian tribes are not *foreign nations* within the intendment of that clause, it does not follow that they are not so in another part of the instrument giving judicial jurisdiction to controversies between a state and foreign states. The constitution varies its phraseology in different parts of it when speaking of external authorities. In one place they are termed *foreign nations,* in another *foreign states,* and in another *foreign powers;* and the construction in each case will depend in some degree on the context and the subject matter.

In the grant of judicial powers the term *foreign states* stands naked without any qualification accompanying it as to Indian tribes; and it is therefore to be taken in its largest sense, and with reference to the great principle of constitutional policy in view, and which was the preservation of the peace, and the maintenance of the faith and justice of the union.

The clause in the constitution which was just cited may have contained the additional grant of power, to regulate commerce *with the Indian tribes,* out of abundant caution, and to prevent any possible doubt of the application to them of the power to regulate commerce *with foreign nations.* These last words, I apprehend, would have reached the case of the Indians, but the constitution in several other instances has gone into a like specification of powers, which were by necessary implication included in the more general grant. Thus, for instance, power is given to congress to declare war; and, it is immediately subjoined, *and grant letters of marque and reprisal.* They have power to coin money, and *regulate the value thereof.* They have power to raise armies, and provide and maintain a navy; and it is immediately subjoined, *and make rules for the government,* (and not government only, but it is added) *and regulation of the land and naval forces.* These, and other instances which might be enumerated, are sufficient to show that we ought not to be deterred, in reference to judicial powers, from the application of the term *foreign states* to the Indian tribes, merely because in another part of the instrument on a different subject, after the grant of the power to regulate commerce with foreign nations, it is added *and with the Indian tribes.*

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There does not appear to be any reasonable ground to doubt of the competence of a *foreign state* under the provision in the constitution, to sue one of the states of the union. The supreme court has original jurisdiction where "a state shall be a party," and this applies as well to a state in the character of defendant as of plaintiff. This was so explained and declared by the supreme court in the case of Chisholm *vs.* Georgia, 2 Dallas, 419, and which I deem a sound and incontrovertible authority for the point.

As an abstract proposition, and a constitutional principle, it may safely be laid down that a foreign state may sue one of the United States. In the case from Dallas, it was assumed by two of the court (Justices *Blair* and *Cushing*), to be a clear proposition; and it was not questioned by any of them. But in the ordinary course of things the occurrence may never take place; for the constitution prohibits any state from entering into any "agreement or compact with a foreign power." The Indian cases are those only in which the *casus fœderis* is likely to occur; and in those cases the capacity of that feeble and unfortunate race of primeval American powers, to seek for redress under the protecting arm of the constitution against the overbearing superiority of their white neighbours; seems to be peculiarly desirable, and exalts the dignity of the provision.

If the supreme court has original jurisdiction in the case, it appears to me to follow of course that they may award an injunction on a bill filed by the Cherokee nation, and stating their right and title. The process would go to restrain the officers of Georgia under the law of that state, from executing any process within the Indian territory, incompatible with their rights and privileges as heretofore enjoyed and recognized by the laws and treaties of the United States. The injunction could be provisional in the first instance, or *pendente lite*; and if the decree should be against the validity of the statute, a permanent injunction would be the effective part of the final decree. The equitable is coextensive with the legal jurisdiction of the court in all cases arising under the constitution, the laws and treaties of the union; and the process of injunction might become indispensable to prevent irreparable mischief or the destruction of the rights and privileges of the

Cherokees pending the suit, and of which rights and privileges they are in the *actual possession.*

Assuming that the court has jurisdiction to sustain a bill, all the remedies suitable to the case, and founded on known and settled principles of American equity jurisprudence would seem necessarily to exist, and to be applicable to the due administration of justice in such a suit. The process operates *in personam;* and if the court possesses jurisdiction over the case, I apprehend there could be no difficulty in restraining acts of the Georgia officers over the rights of the complainants within their own territory.

A court of equity does not regard the situation of the subject matter in dispute, but considers only the equities arising from the acts of the parties. It has enjoined a party from proceedings in a foreign court. Wharton *vs.* May, 9 Vesey, 27. Kennedy *vs.* Cassilis, cited in Eden on Injunctions, 163.

Is the construction given by the president of the United States to the treaties existing between the United States and the Cherokee nation of Indians, binding and conclusive upon the supreme court?

It is understood that the president has communicated to the Cherokees as the sense of the executive department of the government, that their claim to the protection of the United States against the operation of the statute of Georgia, cannot be recognized. I would observe, with great respect and submission, that I cannot perceive upon what sound principle the president of the United States has formed the opinion that he was no longer bound to cause to be executed the treaties of the United States with the Cherokees, or the Indian intercourse act of 1802. If the Cherokees are to be put out of the protection of the United States, as against the operation of the statute of Georgia, they are to be out of the protection both of the treaties and the act of congress. The president is "vested with the executive power;" and he is charged with the duty to "take care that the laws be faithfully executed."

The acts of congress, and all treaties duly made and promulgated, are the supreme law of the land; and it is not in the power of any single state, by any law or ordinance of its own, to abrogate or impair the binding obligation of the paramount laws and treaties of the union. This may be consid-

ered to be a settled axiom in our constitutional jurisprudence. A contrary doctrine would go at once to the annihilation of the national authority, and the eventual dissolution of the confederacy. If the provisions of the intercourse act of 1802 were valid, and if the treaties with the Cherokees were binding prior to the act of Georgia in 1829, they must be equally so after it had passed; for it is impossible to suppose that the existence or legal efficacy of either the one or the other depended upon the will and pleasure of a single state. The executive power, in the exercise of its functions, may often be obliged to judge in the first instance of the extent of its duty under any given law; but it always judges at its peril, and the law of the land is and must be sovereign over all the officers of the government; and neither the executive nor judicial department possesses any dispensing power. Neither of them can set aside a treaty, or dispense with its provisions, any more than with a statute law. They are both equally laws of imperative obligation, though the former is the paramount law, and the most sacred in its nature; for it involves in its observance a breach of peace, and the good faith of the nation. The judiciary is the regular organ of the constitution, for construing laws and judging of their extent and force; and the executive capacity, on this point, arises only incidentally in the due course of executive duty. The judicial power is a distinct and independent branch of the government, created and set apart, and clothed with peculiar qualifications for the very purpose of declaring the law in all questionable and controverted cases. Its power and functions cannot be affected or impaired by any interpretation of statutes or treaties, or by any opinion as to their force and application which the executive power may have thought it expedient or necessary to form.

I am therefore of opinion that the president's construction of the treaties with the Cherokees is not conclusive or binding upon the supreme court.

If the Cherokees be not a foreign state, in the sense of the constitution, can John Ross, or the principal chief of the Cherokee nation, and duly authorised by them to represent them and their rights, be entitled to sue out from the circuit court of the United States process of injunction against the

officers of Georgia acting in execution of the statute of Georgia?

After the conclusion to which I have arrived in considering the first question (and which is the great and leading question in the case), I have no difficulty in the opinion that John Ross is to be deemed an alien, even though the Cherokee nation should not be deemed a *foreign state*, in the sense of the constitution.

The Cherokees are certainly not to be considered as *citizens* of the United States, and they have never been recognized as such, or deemed to possess any of the requisite qualifications of citizens. They have never been claimed to owe us individual allegiance. All the documentary and recorded evidence, embodied in the history of the United States, and the transactions of their government, applicable to the question, clearly shows that the Cherokees have been regarded and dealt with as a race of men distinct from the citizens of the United States; and while within their own territory, not subject to our municipal laws, but owing allegiance to their own tribe. The statute of Georgia could not make them citizens, even if it were in other respects unexceptionable; for it belongs *exclusively* to the congress of the United States to prescribe the rule of naturalization: and no alien can be made a citizen but in the mode directed by the act of congress.

That being the case, a Cherokee Indian is entitled to sue in the circuit court of the United States, equally with any other alien; and though he cannot sue the state of Georgia as a state, he can sue its officers in their individual character, for doing acts that will sustain a suit, though those acts be in pursuance of and in execution of a state law held to be invalid. The court simply inspect the record to determine whether the party be a state or an individual, and the case of Osborn *vs.* The Bank of the United States, 9 Wheat. 738, proves that the courts of the United States have jurisdiction on behalf of an individual against state officers, though the officers were acting under the direction of a state law.

If Ross hold any legal interest as *trustee* for the Cherokees, he is competent to sue even in a court of law, in his own name, and in his own alien character, and even without

reference to the character of his *cestui que trusts.* 4 Cranch, 306, 308. 5 Cranch, 91, 303. 8 Wheat. 642. But in equity he can file his bill by and on behalf of himself and the residue of the Cherokee nation, and duly authorised for that purpose as their head and representative, and be entitled to obtain any process that the merits of the case in the bill should warrant. It appears to me that no difficulty could arise in consequence of his appearing to act for himself and on behalf of the residue of the tribe, under due authorization. The character of a court of equity, and the free and liberal nature of its pleadings would not suffer any technical scruple to be interposed.

Can any individual of the Cherokee nation, personally affected in his rights by the operation and execution of the act of Georgia, sue out such process, or maintain a suit for a personal injury produced in the execution of the act of Georgia; in the circuit court of the United States for the district of Georgia?

This question has been essentially answered by the answer to the preceding question. The Cherokee Indians are aliens, and can sue in the federal courts the persons acting in execution of the law of Georgia for an injury that is personal. I see no reason why such a suit should not be maintained at law for a trespass or tort, or by bill in equity, in case the cause of action be of an equitable nature; though I cannot suppose that such a cause of action is very likely to occur to an individual Indian in his individual capacity. The injury that an individual would suffer would probably be of a tortious nature. The violation or destruction of the civil or political privileges of the tribe would be an affair of the tribe, and not of a separate individual. The injury that he is to receive, separately considered, would probably be such as affected his *personal liberty or property;* and I cannot well answer so general a question in respect to an equitable preventive remedy by process of injunction, without having a special case stated.

There must in general be a strong and peculiar case of trespass, going to the destruction of the estate, or where the mischief would be remediless and not susceptible of perfect pecuniary compensation; to entitle a party to the interference of a court of equity by injunction. This is the general doctrine. See the authorities referred to in Jerome *vs.* Ross, 7 Johnson's

Ch. Rep. 315. But I will not say there may not be cases of mere trespass, where chancery will interpose by injunction, though the party can have redress in damages. The special preventive remedy by injunction depends greatly upon the application of sound undefined *discretion* to the particular circumstances of the case.

Has the supreme court appellate jurisdiction under the twenty-fifth section of the judiciary act of congress, in case of a decision in the highest court of law or equity in Georgia, under the said act, in favour of its validity, or against the constitution, treaties and laws of the United States?

I cannot hesitate to give an affirmative answer to this question. If, in rendering a final judgment or decree in any suit in the highest court of law or equity of a state, the validity of a treaty is drawn in question, and the determination is against its validity; or the construction of a treaty is drawn in question, and the decision is against the right, title or privilege set up or claimed under it; or, if the validity of a statute of the United States, or authority exercised under it, be drawn in question, and the decision be against that validity; or, if the validity of any statute or other state authority be drawn in question, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, and the decision be in favour of its validity; or if the construction of any clause of the constitution of the United States, or of a treaty or statute, be drawn in question, and the decision be against the title, right, or privilege claimed under the same: *in all these cases* the supreme court of the United States has appellate jurisdiction; and these cases reach and embrace every controversy that can arise between the Cherokees, and the state of Georgia or its officers, under the execution of the act of Georgia.

JAMES KENT.

New York, 23d October 1830.

APPENDIX, No. II.

TREATIES BETWEEN THE UNITED STATES AND THE CHEROKEE NATIONS OF INDIANS.

TREATY OF 28 NOVEMBER 1785.

Articles concluded at Hopewell, on the Keowee, between Benjamin Hawkins, Andrew Pickens, Joseph Martin, and Lachlan M'Intosh, Commissioners Plenipotentiary of the United States of America, of the one part, and the head men and warriors of all the Cherokees, of the other.

The commissioners plenipotentiary of the United States, in congress assembled, give peace to all the Cherokees, and receive them into the favour and protection of the United States of America, on the following conditions:

Art. 1. The head men and warriors of all the Cherokees shall restore all the prisoners, citizens of the United States, or subjects of their allies, to their entire liberty: they shall also restore all the negroes, and all other property taken during the late war from the citizens, to such person, and at such time and place, as the commissioners shall appoint.

Art. 2. The commissioners of the United States, in congress assembled, shall restore all the prisoners taken from the Indians during the late war, to the head men and warriors of the Cherokees, as early as is practicable.

Art. 3. The said Indians, for themselves and their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whatsoever.

Art. 4. The boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States, within the limits of the United States of America, is and shall be the following, viz. Beginning at the mouth of Duck river, on the Tennessee; thence running north-east to the ridge dividing the waters running into Cumberland from those running into the Tennessee; thence eastwardly along the said ridge to a north-east line to be run, which shall strike the river Cumberland forty miles above Nashville; thence along the said line to the river; thence up the said river to the ford where the Kentucky road crosses the river; thence to Campbell's line, near Cumberland Gap; thence to the mouth of Claud's creek on Holston; thence to the Chimney-top mountain; thence to Camp creek, near the mouth of Big Limestone, on Nolichuckey; thence a southerly course, six miles to a mountain; thence south to the North Carolina line; thence to the South Carolina Indian boundary, and along the same south-west over the top of the Oconee mountain till it shall strike Tu-

galo river; thence a direct line to the top of the Currahee mountain; thence to the head of the south fork of Oconee river.

Art. 5. If any citizen of the United States, or other person, not being an Indian, shall attempt to settle on any of the lands westward or southward of the said boundary, which are hereby allotted to the Indians for their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty, such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please: provided nevertheless, that this article shall not extend to the people settled between the fork of French Broad and Holston rivers, whose particular situation shall be transmitted to the United States, in congress assembled, for their decision thereon, which the Indians agree to abide by.

Art. 6. If any Indian or Indians, or person residing among them, or who shall take refuge in their nation, shall commit a robbery or murder, or other capital crime, on any citizen of the United States, or person under their protection, the nation or the tribe to which such offender or offenders may belong, shall be bound to deliver him or them up to be punished according to the ordinances of the United States: provided that the punishment shall not be greater than if the robbery, or murder, or other capital crime, had been committed by a citizen on a citizen.

Art. 7. If any citizen of the United States, or person under their protection, shall commit a robbery or murder, or other capital crime, on any Indian, such offender or offenders shall be punished in the same manner as if the murder or robbery, or other capital crime, had been committed on a citizen of the United States; and the punishment shall be in presence of some of the Cherokees, if any shall attend at the time and place, and that they may have an opportunity so to do, due notice of the time of such intended punishment shall be sent to some one of the tribes.

Art. 8. It is understood that the punishment of the innocent, under the idea of retaliation, is unjust, and shall not be practised on either side, except where there is a manifest violation of this treaty; and then it shall be preceded first by a demand of justice; and if refused, then by a declaration of hostilities.

Art. 9. For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade, with the Indians, and managing all their affairs in such manner as they think proper.

Art. 10. Until the pleasure of congress be known, respecting the ninth article, all traders, citizens of the United States, shall have liberty to go to any of the tribes or towns of the Cherokees to trade with them, and they shall be protected in their persons and property, and kindly treated.

Art. 11. The said Indians shall give notice to the citizens of the United States of any designs which they may know or suspect to be formed in any neighbouring tribe, or by any person whomsoever, against the peace, trade, or interest of the United States.

Art. 12. That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to congress.

Art. 13. The hatchet shall be for ever buried, and the peace given by the United States, and friendship re-established between the said states on the one part, and all the Cherokees on the other, shall be universal; and the contracting

parties shall use their utmost endeavours to maintain the peace given as aforesaid, and friendship re-established.

In witness of all and every thing herein determined, between the United States of America and all the Cherokees, we, their underwritten commissioners, by virtue of our full powers, have signed this definitive treaty, and have caused our seals to be hereunto affixed.

Done at Hopewell, on the Keowee, this twenty-eighth day of November, in the year of our Lord one thousand seven hundred and eighty-five.

Signed and sealed by the commissioners of the United States, and thirty-seven chiefs and warriors of the Cherokee nation.

TREATY OF 2 JULY 1791.

A treaty of peace and friendship, made and concluded between the president of the United States of America, on the part and behalf of the said states, and the undersigned chiefs and warriors of the Cherokee nation of Indians, on the part and behalf of the said nation.

The parties being desirous of establishing a permanent peace and friendship between the United States and the said Cherokee nation, and the citizens and members thereof, and to remove the causes of war by ascertaining their limits and making other necessary, just, and friendly arrangements: the president of the United States, by William Blount, governor of the territory of the United States of America south of the river Ohio, and superintendent of Indian affairs for the southern district, who is vested with full powers for these purposes, by and with the advice and consent of the senate of the United States: and the Cherokee nation, by the undersigned chiefs and warriors representing the said nation, have agreed to the following articles, namely:

Art. 1. There shall be perpetual peace and friendship between all the citizens of the United States of America, and all the individuals composing the whole Cherokee nation of Indians.

Art. 2. The undersigned chiefs and warriors, for themselves and all parts of the Cherokee nation, do acknowledge themselves and the said Cherokee nation to be under the protection of the United States of America, and of no other sovereign whatsoever; and they also stipulate that the said Cherokee nation will not hold any treaty with any foreign power, individual state, or with individuals of any state.

Art. 3. The Cherokee nation shall deliver to the governor of the territory of the United States of America south of the river Ohio, on or before the first day of April next, at this place, all persons who are now prisoners, captured by them from any part of the United States: and the United States shall, on or before the same day, at the same place, restore to the Cherokees all the prisoners now in captivity, which the citizens of the United States have captured from them.

Art. 4. The boundary between the citizens of the United States and the Cherokee nation, is and shall be as follows: beginning at the top of the Currahee mountain, where the Creek line passes it; thence a direct line to Tugelo river; thence north-east to the Occunna mountain, and over the same along the South Carolina Indian boundary, to the North Carolina boundary; thence north to a point from which a line is to be extended to the river Clinch, that shall pass the

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Holston at the ridge which divides the waters running into Little River from those running into the Tennessee; thence up the river Clinch to Campbell's line, and along the same to the top of Cumberland mountain; thence a direct line to the Cumberland river where the Kentucky road crosses it; thence down the Cumberland river to a point from which a south-west line will strike the ridge which divides the waters of Cumberland from those of Duck river, forty miles above Nashville; thence down the said ridge to a point from whence a south-west line will strike the mouth of Duck river.

And in order to preclude forever all disputes relative to the said boundary, the same shall be ascertained and marked plainly, by three persons appointed by the United States, and three Cherokees on the part of their nation.

And in order to extinguish forever all claims of the Cherokee nation, or any part thereof, to any of the land lying to the right of the line above described, beginning as aforesaid at the Currahee mountain, it is hereby agreed that in addition to the consideration heretofore made for the said land, the United States will cause certain valuable goods to be immediately delivered to the undersigned chiefs and warriors, for the use of their nation; and the said United States will also cause the sum of one thousand dollars to be paid annually to the said Cherokee nation. And the undersigned chiefs and warriors do hereby, for themselves and the whole Cherokee nation, their heirs and descendants, for the considerations above mentioned, release, quit claim, relinquish, and cede, all the land to the right of the line described, and beginning as aforesaid.

Art. 5. It is stipulated and agreed, that the citizens and inhabitants of the United States shall have a free and unmolested use of a road from Washington district to Mero district, and of the navigation of the Tennessee river.

Art. 6. It is agreed on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade.

Art. 7. The United States solemnly guaranty to the Cherokee nation all their lands not hereby ceded.

Art. 8. If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please.

Art. 9. No citizen or inhabitant of the United States shall attempt to hunt or destroy the game on the lands of the Cherokees; nor shall any citizen or inhabitant go into the Cherokee country, without a passport first obtained from the governor of some one of the United States, or territorial districts, or such other person as the president of the United States may, from time to time, authorize to grant the same.

Art. 10. If any Cherokee Indian or Indians, or person residing among them, or who shall take refuge in their nation, shall steal a horse from, or commit a robbery or murder, or other capital crime, on any citizens or inhabitants of the United States, the Cherokee nation shall be bound to deliver him or them up, to be punished according to the laws of the United States.

Art. 11. If any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory belonging to the Cherokees, and shall there commit any crime upon or trespass against the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender

or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

Art. 12. In case of violence on the persons or property of the individuals of either party, neither retaliation nor reprisal shall be committed by the other, until satisfaction shall have been demanded of the party of which the aggressor is, and shall have been refused.

Art. 13. The Cherokees shall give notice to the citizens of the United States, of any designs which they may know or suspect to be formed in any neighbouring tribe, or by any person whatever, against the peace and interest of the United States.

Art. 14. That the Cherokee nation may be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters, the United States will, from time to time, furnish, gratuitously, the said nation with useful implements of husbandry; and further to assist the said nation in so desirable a pursuit, and at the same time to establish a certain mode of communication, the United States will send such and so many persons to reside in said nation, as they may judge proper, not exceeding four in number, who shall qualify themselves to act as interpreters. These persons shall have lands assigned by the Cherokees for cultivation for themselves and their successors in office; but they shall be precluded exercising any kind of traffic.

Art. 15. All animosities for past grievances shall henceforth cease, and the contracting parties will carry the foregoing treaty into full execution with all good faith and sincerity.

Art. 16. This treaty shall take effect and be obligatory on the contracting parties as soon as the same shall have been ratified by the president of the United States, with the advice and consent of the senate of the United States.

In witness of all and every thing herein determined between the United States of America and the whole Cherokee nation, the parties have hereunto set their hands and seals, at the treaty ground on the bank of the Holston, near the mouth of the French Broad, within the United States, this second day of July, in the year of our Lord one thousand seven hundred and ninety-one.

Signed and sealed by William Blount, governor in and over the territory of the United States of America south of the river Ohio, and superintendent of Indian affairs for the southern district; and by forty-one chiefs and warriors of the Cherokee nation.

Additional Article to the treaty made between the United States and the Cherokees, on the 2d of July, one thousand seven hundred and ninety-one.

It is hereby mutually agreed, between Henry Knox, secretary of war, duly authorised thereto in behalf of the United States, on the one part, and the undersigned chiefs and warriors, in behalf of themselves and the Cherokee nation, on the other part, that the following article shall be added to, and considered as part of, the treaty made between the United States and the said Cherokee nation, on the 2d day of July, one thousand seven hundred and ninety-one, to wit:

The sum to be paid annually by the United States to the Cherokee nation of Indians, in consideration of the relinquishment of lands, as stated in the treaty made with them on the 2d day of July, one thousand seven hundred and ninety-

one, shall be one thousand five hundred dollars, instead of one thousand dollars, mentioned in the said treaty.

In testimony whereof, the said Henry Knox, secretary of war, and the said chiefs and warriors of the Cherokee nation, have hereunto set their hands and seals, in the city of Philadelphia, this seventeenth day of February, in the year of our Lord one thousand seven hundred and ninety-two.

Signed by H. Knox, secretary at war, and by seven Cherokee chiefs and warriors.

TREATY OF 26 JUNE 1794.

Articles of a treaty between the United States of America and the Cherokee Indians.

Whereas the treaty made and concluded on Holston river, on the second day of July one thousand seven hundred and ninety-one, between the United States of America and the Cherokee nation of Indians, has not been fully carried into execution by reason of some misunderstandings which have arisen:

Art. 1. And whereas the undersigned Henry Knox, secretary for the department of war, being authorised thereto by the president of the United States, in behalf of the said United States; and the undersigned chiefs and warriors, in their own names, and in behalf of the whole Cherokee nation, are desirous of re-establishing peace and friendship between the said parties in a permanent manner, do hereby declare, that the said treaty of Holston is, to all intents and purposes, in full force, and binding upon the said parties, as well in respect to the boundaries therein mentioned, as in all other respects whatever.

Art. 2. It is hereby stipulated that the boundaries mentioned in the fourth article of the said treaty shall be actually ascertained and marked in the manner prescribed by the said article, whenever the Cherokee nation shall have ninety days notice of the time and place at which the commissioners of the United States intend to commence their operation.

Art. 3. The United States, to evince their justice by amply compensating the said Cherokee nation of Indians for all relinquishments of land made, either by the treaty of Hopewell, upon the Keowee river, concluded on the twenty-eighth of November, one thousand seven hundred and eighty-five; or the aforesaid treaty made upon Holston river, on the second of July one thousand seven hundred and ninety-one; do hereby stipulate, in lieu of all former sums to be paid annually, to furnish the Cherokee Indians with goods suitable for their use, to the amount of five thousand dollars yearly.

Art. 4. And the said Cherokee nation, in order to evince the sincerity of their intentions in future, to prevent the practice of stealing horses, attended with the most pernicious consequences to the lives and peace of both parties, do hereby agree, that for every horse which shall be stolen from the white inhabitants by any Cherokee Indians, and not returned within three months, that the sum of fifty dollars shall be deducted from the said annuity of five thousand dollars.

Art. 5. The articles now stipulated will be considered as permanent additions to the treaty of Holston, as soon as they shall have been ratified by the president of the United States and the senate of the United States.

In witness of all and every thing herein determined between the United States

of America and the whole Cherokee nation, the parties have hereunto set their hands and seals, in the city of Philadelphia, within the United States, this twenty-sixth day of June, in the year of our Lord one thousand seven hundred and ninety-four.

Signed and sealed by H. Knox, secretary at war; and by thirteen chiefs and warriors of the Cherokee Indians.

TREATY OF 2 OCTOBER 1798.

Articles of a treaty between the United States of America and the Cherokee Indians.

Whereas the treaty made and concluded on Holston river, on the second day of July, in the year one thousand seven hundred and ninety-one, between the United States of America and the Cherokee nation of Indians, had not been carried into execution for some time thereafter, by reason of some misunderstandings which had arisen; and whereas, in order to remove such misunderstandings, and to provide for carrying the said treaty into effect, and for re-establishing more fully the peace and friendship between the parties, another treaty was held, made, and concluded, by and between them, at Philadelphia, the twenty-sixth day of June, in the year one thousand seven hundred and ninety-four: in which, among other things, it was stipulated, that the boundaries mentioned in the fourth article of the said treaty of Holston, should be actually ascertained and marked, in the manner prescribed by the said article whenever the Cherokee nation should have ninety days notice of the time and place at which the commissioners of the United States intended to commence their operations: and whereas further delays in carrying the said fourth article into complete effect did take place, so that the boundaries, mentioned and described therein, were not regularly ascertained and marked until the latter part of the year one thousand seven hundred and ninety seven; before which time, and for want of knowing the direct course of the said boundary, divers settlements were made, by divers citizens of the United States, upon the Indian lands over and beyond the boundaries so mentioned and described in the said article, and contrary to the intention of the said treaties; but which settlers were removed from the said Indian lands by authority of the United States, as soon after the boundaries had been so lawfully ascertained and marked as the nature of the case had admitted: and whereas, for the purpose of doing justice to the Cherokee nation of Indians, and remedying inconveniences arising to citizens of the United States from the adjustment of the boundary line between the lands of the Cherokees and those of the United States, or the citizens thereof, or from any other cause in relation to the Cherokees; and in order to promote the interests and safety of the said states, and the citizens thereof, the president of the United States, by and with the advice and consent of the senate thereof, hath appointed George Walton, of Georgia, and the president of the United States hath also appointed lieutenant colonel Thomas Butler, commanding the troops of the United States in the state of Tennessee, to be commissioners for the purpose aforesaid: and who, on the part of the United States, and the Cherokee nation, by the undersigned chiefs and warriors, representing the said nation, have agreed to the following articles, namely:

Art. 1. The peace and friendship subsisting between the United States and the Cherokee people, are hereby renewed, continued, and declared perpetual.

[The Cherokee Nation *vs.* The State of Georgia.]

Art. 2. The treaties subsisting between the present contracting parties, are acknowledged to be of full and operating force; together with the construction and usage under their respective articles, and so to continue.

Art. 3. The limits and boundaries of the Cherokee nation, as stipulated and marked by the existing treaties between the parties, shall be and remain the same, where not altered by the present treaty.

Art. 4. In acknowledgement for the protection of the United States, and for the considerations herein after expressed and contained, the Cherokee nation agree, and do hereby relinquish and cede to the United States, all the lands within the following points and lines, viz. from a point on the Tennessee river, below Tellico block house, called the Wildcat Rock, in a direct line to the Militia spring, near the Maryville road leading from Tellico. From the said spring to the Chillhowie mountain, by a line so to be run, as will leave all the farms on Nine Mile Creek to the northward and eastward of it; and to be continued along Chillhowie mountain, until it strikes Hawkins's line. Thence along the said line to the great Iron mountain; and from the top of which a line to be continued in a south eastwardly course to where the most southwardly branch of Little river crosses the divisional line to Tugalo river: from the place of beginning, the Wildcat Rock, down the northeast margin of the Tennessee river (not including islands) to a point or place one mile above the junction of that river with the Clinch, and from thence by a line to be drawn in a right angle, until it intersects Hawkins's line leading from Clinch. Thence down the said line to the river Clinch; thence up the said river to its junction with Emmery's river; and thence up Emmery's river to the foot of Cumberland mountain. From thence a line to be drawn north eastwardly, along the foot of the mountain, until it intersects with Campbell's line.

Art. 5. To prevent all future misunderstanding about the line described in the foregoing article, two commissioners shall be appointed to superintend the running and marking the same, where not ascertained by the rivers, immediately after signing this treaty; one to be appointed by the commissioners of the United States, and the other by the Cherokee nation; and who shall cause three maps or charts thereof to be made out; one whereof shall be transmitted and deposited in the war office of the United States; another with the executive of the state of Tennessee, and the third with the Cherokee nation, which said line shall form a part of the boundary between the United States and the Cherokee nation.

Art. 6. In consideration of the relinquishment and cession hereby made, the United States, upon signing the present treaty, shall cause to be delivered to the Cherokees, goods, wares, and merchandise, to the amount of five thousand dollars, and shall cause to be delivered, annually, other goods, to the amount of one thousand dollars, in addition to the annuity already provided for; and will continue the guarantee of the remainder of their country forever, as made and contained in former treaties.

Art. 7. The Cherokee nation agree, that the Kentucky road, running between the Cumberland mountain and the Cumberland river, where the same shall pass through the Indian land, shall be an open and free road for the use of the citizens of the United States, in the like manner as the road from Southwest Point to Cumberland river. In consideration of which it is hereby agreed on the part of the United States, that until settlements shall make it improper, the Cherokee hunters shall be at liberty to hunt and take game upon the lands relinquished and ceded by this treaty.

Art. 8. Due notice shall be given to the principal towns of the Cherokees, of the time proposed for delivering the annual stipends; and sufficient supplies of provisions shall be furnished, by and at the expense of the United States, to subsist such reasonable number that may be sent, or shall attend to receive them, during a reasonable time.

Art. 9. It is mutually agreed between the parties, that horses stolen and not returned within ninety days shall be paid for at the rate of sixty dollars each; if stolen by a white man, citizen of the United States, the Indian proprietor shall be paid in cash; and if stolen by an Indian from a citizen, to be deducted as expressed in the fourth article of the treaty of Philadelphia. This article shall have retrospect to the commencement of the first conferences at this place in the present year, and no further. And all animosities, aggressions, thefts, and plunderings, prior to that day, shall cease, and be no longer remembered or demanded on either side.

Art. 10. The Cherokee nation agree, that the agent who shall be appointed to reside among them from time to time, shall have a sufficient piece of ground allotted for his temporary use.

And lastly, this treaty, and the several articles it contains, shall be considered as additional to, and forming a part of, treaties already subsisting between the United States and the Cherokee nation, and shall be carried into effect on both sides, with all good faith, as soon as the same shall be approved and ratified by the president of the United States and senate thereof.

In witness of all and every thing herein determined between the United States of America, and the whole Cherokee nation, the parties hereunto set their hands and seals in the council house, near Tellico, on Cherokee ground, and within the United States, this second day of October, in the year one thousand seven hundred and ninety-eight, and in the twenty-third year of the independence and sovereignty of the United States.

Signed and sealed by the commissioners of the United States, and by thirty-nine chiefs and warriors of the Cherokee nation.

TREATY OF 25 OCTOBER 1805.

Articles of a treaty agreed upon between the United States of America, by their commissioners Return J. Meigs and Daniel Smith, appointed to hold conferences with the Cherokee Indians, for the purpose of arranging certain interesting matters with the said Cherokees, of the one part, and the undersigned chiefs and head men of the said nation, of the other part.

Art. 1. All former treaties, which provide for the maintenance of peace and preventing of crimes, are, on this occasion, recognized and continued in force.

Art. 2. The Cherokees quit claim and cede to the United States, all the land which they have heretofore claimed, lying to the north of the following boundary line: beginning at the mouth of Duck river, running thence up the main stream of the same to the junction of the fork, at the head of which fort Nash stood, with the main south fork; thence a direct course to a point on the Tennessee river bank opposite the mouth of Hiwassee river. If the line from Hiwassee should leave out Field's Settlement, it is to be marked round this improvement, and then

continued the straight course; thence up the middle of the Tennessee river (but leaving all the islands to the Cherokees), to the mouth of Clinch river; thence up the Clinch river to the former boundary line agreed upon with the said Cherokees, reserving, at the same time, to the use of the Cherokees, a small tract lying at and below the mouth of Clinch river; from the mouth extending thence down the Tennessee river, from the mouth of Clinch to a notable rock on the north bank of the Tennessee, in view from Southwest Point; thence a course at right angles with the river, to the Cumberland road; thence eastwardly along the same, to the bank of Clinch river, so as to secure the ferry landing to the Cherokees up to the first hill, and down the same to the mouth thereof, together with two other sections of one square mile each, one of which is at the foot of Cumberland mountain, at and near the place where the turnpike gate now stands; the other on the north bank of the Tennessee river, where the Cherokee Talootiske now lives. And whereas, from the present cession made by the Cherokees, and other circumstances, the site of the garrisons at Southwest Point and Tellico, are become not the most convenient and suitable places for the accommodation of the said Indians, it may become expedient to remove the said garrisons and factory to some more suitable place; three other square miles are reserved for the particular disposal of the United States on the north bank of the Tennessee, opposite to and below the mouth of Hiwassee.

Art. 3. In consideration of the above cession and relinquishment, the United States agree to pay immediately three thousand dollars in valuable merchandise, and eleven thousand dollars within ninety days after the ratification of this treaty, and also an annuity of three thousand dollars, the commencement of which is this day. But so much of the said eleven thousand dollars, as the said Cherokees may agree to accept in useful articles of, and machines for, agriculture and manufactures, shall be paid in those articles, at their option.

Art. 4. The citizens of the United States shall have the free and unmolested use and enjoyment of the two following described roads, in addition to those which are at present established through their country; one to proceed from some convenient place near the head of Stone's river, and fall into the Georgia road at a suitable place towards the southern frontier of the Cherokees. The other to proceed from the neighbourhood of Franklin, or Big Harpath, and crossing the Tennessee at or near the Muscle Shoals, to pursue the nearest and best way to the settlements on the Tombigbee. These roads shall be viewed and marked out by men appointed on each side for that purpose; in order that they may be directed the nearest and best ways, and the time of doing the business, the Cherokees shall be duly notified.

Art. 5. This treaty shall take effect and be obligatory on the contracting parties, as soon as it is ratified by the president of the United States, by and with the advice and consent of the senate of the same.

In testimony whereof, the said commissioners, and the undersigned chiefs and head men of the Cherokees, have hereto set their hands and seals.

Done at Tellico, the twenty-fifth day of October one thousand eight hundred and five.

Signed and sealed by the commissioners of the United States, and by thirty-three chiefs and warriors of the Cherokee nation.

TREATY OF 27 OCTOBER 1805.

Articles of a treaty between the United States of America, by their commissioners, Return J. Meigs and Daniel Smith, who are appointed to hold conferences with the Cherokees, for the purpose of arranging certain interesting matters with the said Indians, of the one part, and the undersigned chiefs and head men of the Cherokees, of the other part.

Art. 1. Whereas it has been represented by the one party to the other, that the section of land on which the garrison of Southwest Point stands, and which extends to Kingston, is likely to be a desirable place for the assembly of the state of Tennessee to convene at (a committee from that body now in session having viewed the situation): now, the Cherokees being possessed of a spirit of conciliation, and seeing that this tract is desired for public purposes, and not for individual advantages, reserving the ferries to themselves, quit claim, and cede to the United States the said section of land, understanding, at the same time, that the buildings erected by the public are to belong to the public, as well as the occupation of the same, during the pleasure of the government; we also cede to the United States the first island in the Tennessee, above the mouth of Clinch.

Art. 2. And whereas the mail of the United States is ordered to be carried from Knoxville to New Orleans, through the Cherokee, Creek, and Choctaw countries; the Cherokees agree, that the citizens of the United States shall have, so far as it goes through their country, the free and unmolested use of a road leading from Tellico to Tombigbee, to be laid out by viewers appointed on both sides, who shall direct it the nearest and best way; and the time of doing the business the Cherokees shall be notified of.

Art. 3. In consideration of the above cession and relinquishment, the United States agree to pay to the said Cherokee Indians, sixteen hundred dollars in money, or useful merchandise, at their option, within ninety days after the ratification of this treaty.

Art. 4. This treaty shall be obligatory between the contracting parties, as soon as it is ratified by the president, by and with the advice and consent of the senate of the United States.

In testimony whereof, the said commissioners, and the undersigned chiefs and head men of the Cherokees, have hereto set their hands and seals.

Done at Tellico, this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and five.

Signed and sealed by the commissioners of the United States, and by fourteen chiefs and warriors of the Cherokees.

TREATY OF 7 JANUARY 1806.

Articles of a convention made between Henry Dearborn, secretary of war, being specially authorized thereto by the president of the United States, and the undersigned chiefs and head men of the Cherokee nation of Indians, duly authorized and empowered by said nation.

Art. 1. The undersigned chiefs and head men of the Cherokee nation of Indians, for themselves and in behalf of their nation, relinquish to the United

[The Cherokee Nation *vs.* The State of Georgia.]

States all right, title, interest, and claim, which they or their nation have or ever had to all that tract of country which lies to the northward of the river Tennessee, and westward of a line to be run from the upper part of the Chickasaw Old Fields, at the upper point of an island called Chickasaw Island, on said river, to the most easterly head waters of that branch of said Tennessee river called Duck river, excepting the two following described tracts, viz. one tract bounded southerly on the said Tennessee river, at a place called the Muscle Shoals, westerly by a creek called Tekeetanoeh, or Cyprus creek, and easterly by Chuwalee, or Elk river or creek, and northerly by a line to be drawn from a point on said Elk river, ten miles on a direct line from its mouth or junction with Tennessee river, to a point on the said Cyprus creek, ten miles on a direct line from its junction with the Tennessee river.

The other tract is to be two miles in width, on the north side of Tennessee river, and to extend northerly from that river three miles, and bounded as follows, viz. beginning at the mouth of Spring creek, and running up said creek three miles on a straight line, thence westerly two miles at right angles with the general course of said creek, thence southerly, on a line parallel with the general course of said creek, to the Tennessee river, thence up said river by its waters to the beginning: which first reserved tract is to be considered the common property of the Cherokees who now live on the same, including John D. Chesholm, Autowwe, and Chechout; and the other reserved tract, on which Moses Melton now lives, is to be considered the property of said Melton and Charles Hicks, in equal shares.

And the said chiefs and head men also agree to relinquish to the United States all right or claim which they or their nation have to what is called the Long Island, in Holston river.

Art. 2. The said Henry Dearborn, on the part of the United States, hereby stipulates and agrees, that in consideration of the relinquishment of the title by the Cherokees, as stated in the preceding article, the United States will pay to the Cherokee nation two thousand dollars in money, as soon as this convention shall be duly ratified by the government of the United States; and two thousand dollars in each of the four succeeding years, amounting in the whole to ten thousand dollars; and that a grist mill shall, within one year from the date hereof, be built in the Cherokee country, for the use of the nation, at such place as shall be considered most convenient; that the said Cherokees shall be furnished with a machine for cleaning cotton; and also, that the old Cherokee chief, called the Black Fox, shall be paid annually one hundred dollars by the United States during his life.

Art. 3. It is also agreed on the part of the United States, that the government thereof will use its influence and best endeavours, to prevail on the Chickasaw nation of Indians, to agree to the following boundary between that nation and the Cherokees, to the southward of the Tennessee river, viz. beginning at the mouth of Caney creek, near the lower part of the Muscle Shoals, and to run up the said creek to its head, and in a direct line from thence to the Flat Stone or Rock, the old corner boundary.

But it is understood by the contracting parties, that the United States do not engage to have the aforesaid line or boundary established, but only to endeavour to prevail on the Chickasaw nation to consent to such a line as the boundary between the two nations.

Art. 4. It is further agreed on the part of the United States, that the claims which the Chickasaws may have to the two tracts reserved by the first article of

this convention on the north side of the Tennessee river, shall be settled by the United States in such manner as will be equitable, and will secure to the Cherokees the title to the said reservations.

Done at the place, and on the day and year first above written*.

Signed and sealed by Henry Dearborn, secretary at war, and by sixteen chiefs and warriors of the Cherokee nation.

Elucidation of the convention of Washington, of the 7th of January 1806.

Whereas, by the first article of a convention between the United States and the Cherokee nation, entered into at the city of Washington, on the 7th day of January one thousand eight hundred and six, it was intended on the part of the Cherokee nation, and so understood by the secretary of war, the commissioner on the part of the United States, to cede to the United States all the right, title, and interest which the said Cherokee nation ever had to a tract of country contained between the Tennessee river and the Tennessee ridge (so called); which tract of country had, since the year one thousand seven hundred and ninety-four, been claimed by the Cherokees and the Chickasaws; the eastern boundary whereof is limited by a line so to be run from the upper part of the Chickasaw Old Fields, as to include all the waters of Elk river, any thing expressed in said convention to the contrary notwithstanding. It is therefore now declared, by James Robertson and Return J. Meigs, acting under the authority of the executive of the United States, and by a delegation of Cherokee chiefs, of whom Eunolee, or Black Fox, the king or head chief of said Cherokee nation, acting on the part of and in behalf of said nation, is one, that the eastern limits of said ceded tract shall be bounded by a line so to be run from the upper end of the Chickasaw Old Fields, a little above the upper point of an island called Chickasaw island, as will most directly intersect the first waters of Elk river, thence carried to the great Cumberland mountain, in which the waters of Elk river have their source; then along the margin of said mountain, until it shall intersect lands heretofore ceded to the United States, at the said Tennessee ridge. And in consideration of the readiness shown by the Cherokees to explain, and to place the limits of the land ceded by the said convention out of all doubt, and in consideration of their expenses in attending council, the executive of the United States will direct that the Cherokee nation shall receive the sum of two thousand dollars, to be paid to them by their agent at such time as the said executive shall direct; and that the Cherokee hunters, as hath been the custom in such cases, may hunt on said ceded tract, until, by the fullness of settlers, it shall become improper. And it is hereby declared by the parties that this explanation ought to be considered as a just elucidation of the cession made by the first article of said convention.

Done at the point of departure of the line at the upper end of the island opposite to the upper part of the said Chickasaw Old Fields, the eleventh day of September in the year one thousand eight hundred and seven.

Signed and sealed by the agents of the United States, and by five chiefs of the Cherokee nation.

* It does not appear by the treaty that there is any place, day, or year, "first above written." But the proclamation of the convention, by the president of the United States, declares that it was "concluded at the city of Washington, on the 7th day of January 1806."

[The Cherokee Nation *vs.* The State of Georgia.]

TREATY OF 22 MARCH 1816.

Articles of a treaty made and concluded at the city of Washington, on the twenty-second day of March one thousand eight hundred and sixteen, between George Graham, being specially authorized by the president of the United States thereto, and the undersigned chiefs and head men of the Cherokee nation, duly authorized and empowered by the said nation.

Art. 1. Whereas the executive of the state of South Carolina has made an application to the president of the United States to extinguish the claim of the Cherokee nation to that part of their lands which lie within the boundaries of the said state, as lately established and agreed upon between that state and the state of North Carolina; and as the Cherokee nation is disposed to comply with the wishes of their brothers of South Carolina, they have agreed and do hereby agree to cede to the state of South Carolina, and for ever quit claim to the tract of country contained within the following bounds, viz. beginning on the east bank of the Chattuga river, where the boundary line of the Cherokee nation crosses the same, running thence with the said boundary line to a rock on the blue ridge, where the boundary line crosses the same, and which rock has been lately established as a corner to the states of North and South Carolina, running thence south sixty-eight and a quarter degrees, west twenty miles and thirty-two chains to a rock on the Chattuga river, at the thirty-fifth degree of north latitude, another corner of the boundaries agreed upon by the states of North and South Carolina, thence down and with the Chattuga to the beginning.

Art. 2. For and in consideration of the above cession, the United States promise and engage that the state of South Carolina shall pay to the Cherokee nation, or its accredited agent, the sum of five thousand dollars within ninety days after the president and senate shall have ratified this treaty: *Provided*, that the Cherokee nation shall have sanctioned the same in council: and provided also, that the executive of the state of South Carolina shall approve of the stipulations contained in this article.

In testimony whereof, the said commissioner, and the undersigned chiefs and head men of the Cherokee nation have hereunto set their hands and seals.

Signed and sealed by George Graham, commissioner of the United States, and by six chiefs and head men of the Cherokee nation.

TREATY OF 22 MARCH 1816.

Articles of a convention made and entered into between George Graham, specially authorized thereto by the president of the United States, and the undersigned chiefs and head men of the Cherokee nation, duly authorized and empowered by the said nation.

Art. 1. Whereas doubts have existed in relation to the northern boundary of that part of the Creek lands lying west of the Coosa river, and which were ceded to the United States by the treaty held at fort Jackson, on the ninth day of August one thousand eight hundred and fourteen: and whereas by the third article of the treaty, dated the seventh of January one thousand eight hundred

and six, between the United States and the Cherokee nation, the United States have recognized a claim on the part of the Cherokee nation to the lands south of the big bend of the Tennessee river, and extending as far west as a place on the waters of Bear creek [a branch of the Tennessee river], known by the name of the Flat Rock or stone: it is, therefore, now declared and agreed, that a line shall be run from a point on the west bank of the Coosa river, opposite to the lower end of the ten islands in said river, and above fort Strother, directly to the Flat Rock or stone on Bear creek [a branch of the Tennessee river]: which line shall be established as the boundary of the lands ceded by the Creek nation to the United States by the treaty held at fort Jackson, on the ninth day of August one thousand eight hundred and fourteen, and of the lands claimed by the Cherokee nation, lying west of the Coosa, and south of the Tennessee rivers.

Art. 2. It is expressly agreed on the part of the Cherokee nation, that the United States shall have the right to lay off, open, and have the free use of such road or roads, through any part of the Cherokee nation, lying north of the boundary line now established, as may be deemed necessary for the free intercourse between the states of Tennessee and Georgia, and the Mississippi territory. And the citizens of the United States shall freely navigate and use, as a highway, all the rivers and waters within the Cherokee nation. The Cherokee nation further agree to establish and keep up, on the roads to be opened under the sanction of this article, such ferries and public houses as may be necessary for the accommodation of the citizens of the United States.

Art. 3. In order to preclude any dispute hereafter, relative to the boundary line now established, it is hereby agreed that the Cherokee nation shall appoint two commissioners to accompany the commissioners already appointed on the part of the United States, to run the boundary lines of the lands ceded by the Creek nation to the United States, while they are engaged in running that part of the boundary established by the first article of this treaty.

Art. 4. In order to avoid unnecessary expense and delay, it is further agreed, that whenever the president of the United States may deem it expedient to open a road through any part of the Cherokee nation, in pursuance of the stipulations of the second article of this convention, the principal chief of the Cherokee nation, shall appoint one commissioner to accompany the commissioners appointed by the president of the United States, to lay off and mark the road; and the said commissioners shall be paid by the United States.

Art. 5. The United States agree to indemnify the individuals of the Cherokee nation for losses sustained by them in consequence of the march of the militia and other troops in the service of the United States through that nation; which losses have been ascertained by the agents of the United States to amount to twenty-five thousand five hundred dollars.

In testimony whereof, the said commissioner, and the undersigned chiefs and head men of the Cherokee nation, have hereunto set their hands and seals. Done at the city of Washington, this twenty-second day of March one thousand eight hundred and sixteen.

Signed and sealed by George Graham, commissioner of the United States, and by six chiefs and head men of the Cherokee nation.

[The Cherokee Nation *vs.* The State of Georgia.]

TREATY OF 14 SEPTEMBER 1816.

To perpetuate peace and friendship between the United States and Cherokee tribe, or nation, of Indians, and to remove all future causes of dissension which may arise from indefinite territorial boundaries, the president of the United States of America, by major general Andrew Jackson, general David Meriwether, and Jesse Franklin, esquire, commissioners plenipotentiary on the one part, and the Cherokee delegates on the other, covenant and agree to the following articles and conditions, which, when approved by the Cherokee nation, and constitutionally ratified by the government of the United States, shall be binding on all parties:

Art. 1. Peace and friendship are hereby firmly established between the United States and Cherokee nation or tribe of Indians.

Art. 2. The Cherokee nation acknowledge the following as their western boundary: South of the Tennessee river, commencing at Camp Coffee, on the south side of the Tennessee river, which is opposite the Chickasaw Island, running from thence a due south course to the top of the dividing ridge between the waters of the Tennessee and Tombigbee rivers, thence eastwardly along said ridge, leaving the head waters of the Black Warrior to the right hand, until opposed by the west branch of Will's Creek, down the east bank of said creek to the Coosa river, and down said river.

Art. 3. The Cherokee nation relinquish to the United States all claim, and cede all title to lands lying south and west of the line, as described in the second article; and, in consideration of said relinquishment and cession, the commissioners agree to allow the Cherokee nation an annuity of six thousand dollars, to continue for ten successive years, and five thousand dollars, to be paid in sixty days after the ratification of the treaty, as a compensation for any improvements which the said nation may have had on the lands surrendered.

Art. 4. The two contracting parties covenant, and agree, that the line, as described in the second article, shall be ascertained and marked by commissioners, to be appointed by the president of the United States; that the marks shall be bold; trees to be blazed on both sides of the line, and the fore and aft trees to be marked with the letters U. S.; that the commissioners shall be accompanied by two persons, to be appointed by the Cherokee nation, and that said nation shall have due and seasonable notice when said operation is to be commenced.

Art. 5. It is stipulated that the Cherokee nation will meet general Andrew Jackson, general David Meriwether, and Jesse Franklin, esquire, in council, at Turkey's Town, Coosa river, on the 28th of September instant, there and then to express their approbation, or not, of the articles of this treaty; and if they do not assemble at the time and place specified, it is understood that the said commissioners may report the same as a tacit ratification, on the part of the Cherokee nation, of this treaty.

In testimony whereof, the said commissioners, and undersigned chiefs and delegates of the Cherokee nation, have hereto set their hands and seals. Done at the Chickasaw council house, this fourteenth day of September in the year of our Lord one thousand eight hundred and sixteen.

Signed and sealed by the commissioners of the United States, and by fifteen chiefs and delegates of the Cherokee nation.

[The Cherokee Nation *vs.* The State of Georgia.]

This treaty was afterwards ratified at Turkey Town, by the whole Cherokee nation in council assembled. In testimony whereof, the commissioners, and ten chiefs and warriors of the Cherokee nation, affixed their hands, on the 4th of October 1816.

TREATY OF 8 JULY 1817.

Articles of a treaty concluded at the Cherokee Agency, within the Cherokee nation, between major general Andrew Jackson, Joseph M'Minn, governor of the state of Tennessee, and general David Meriwether, commissioners plenipotentiary of the United States of America, of the one part; and the chiefs, head men and warriors of the Cherokee nation, east of the Mississippi river, and the chiefs, head men and warriors of the Cherokees on the Arkansas river, and their deputies, John D. Chisholm and James Rodgers, duly authorized by the chiefs of the Cherokees on the Arkansas river, in open council, by written power of attorney, duly signed and executed, in presence of Joseph Sevier and William Ware.

Whereas, in the autumn of the year one thousand eight hundred and eight, a deputation from the Upper and Lower Cherokee towns, duly authorised by their nation, went on to the city of Washington, the first named to declare to the president of the United States their anxious desire to engage in the pursuits of agriculture and civilized life, in the country they then occupied, and to make known to the president of the United States the impracticability of inducing the nation at large to do this, and to request the establishment of a division line between the upper and lower towns, so as to include all the waters of the Hiwassee river to the upper town, that, by thus contracting their society within narrow limits, they proposed to begin the establishment of fixed laws and a regular government: The deputies from the lower towns to make known their desire to continue the hunter life, and also the scarcity of game where they then lived; and, under those circumstances, their wish to remove across the Mississippi river, on some vacant lands of the United States. And whereas, the president of the United States, after maturely considering the petitions of both parties, on the ninth day of January. A.D. one thousand eight hundred and nine, including other subjects, answered those petitions as follows: "The United States, my children, are the friends of both parties; and, as far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our patronage, our aid, and good neighbourhood. Those who wish to remove are permitted to send an exploring party to reconnoitre the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements, which will begin at the mouths of those rivers. The regular districts of the government of St Louis are already laid off to the St Francis.

"When this party shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right. Every aid towards their removal, and what will be necessary for them there, will then be freely administered to them; and when established in their new settlements, we shall still consider

them as our children, give them the benefit of exchanging their peltries for what they will want at our factories, and always hold them firmly by the hand.

And whereas the Cherokees, relying on the promises of the president of the United States, as above recited, did explore the country on the west side of the Mississippi, and made choice of the country on the Arkansas and White rivers, and settled themselves down upon the United States lands, to which no other tribe of Indians have any just claim, and have duly notified the president of the United States thereof, and of their anxious desire for the full and complete ratification of his promise; and, to that end, as notified by the president of the United States, have sent on their agents, with full powers to execute a treaty, relinquishing to the United States all the right, title, and interest to all lands of right to them belonging, as part of the Cherokee nation, which they have left, and which they are about to leave, proportioned to their numbers, including, with those now on the Arkansas, those who are about to remove thither, and to a portion of which they have an equal right agreeably to their numbers.

Now, know ye, that the contracting parties, to carry into full effect the before recited promises with good faith, and to promote a continuation of friendship with their brothers on the Arkansas river, and for that purpose to make an equal distribution of the annuities secured to be paid by the United States to the whole Cherokee nation, have agreed and concluded on the following articles, viz.

Art. 1. The chiefs, head men and warriors of the whole Cherokee nation cede to the United States all the lands lying north and east of the following boundaries, viz. Beginning at the high shoals of the Appalachy river, and running thence along the boundary line between the Creek and Cherokee nations, westwardly to the Chatahouchy river; thence up the Chatahouchy river to the mouth of Souque creek; thence, continuing with the general course of the river until it reaches the Indian boundary line, and, should it strike the Turrurar river, thence, with its meanders, down said river to its mouth, in part of the proportion of land in the Cherokee nation east of the Mississippi, to which those now on the Arkansas and those about to remove there, are justly entitled.

Art. 2. The chiefs, head men and warriors of the whole Cherokee nation do also cede to the United States all the lands lying north and west of the following boundary lines, viz. Beginning at the Indian boundary line that runs from the north bank of the Tennessee river, opposite to the mouth of Hywassee river, at a point on the top of Walden's ridge, where it divides the waters of the Tennessee river, from those of the Sequatchie river; thence along the said ridge, southwardly, to the bank of the Tennesse river, at a point near to a place called the Negro Sugar Camp, opposite to the upper end of the first island above Running Water Town; thence, westwardly, a straight line to the mouth of Little Sequatchie river; thence, up said river, to its main fork; thence, up its northernmost fork, to its source; and thence, due west, to the Indian boundary line.

Art. 3. It is also stipulated by the contracting parties, that a census shall be taken of the whole Cherokee nation, during the month of June, in the year of our Lord one thousand eight hundred and eighteen, in the following manner, viz. That the census of those on the east side of the Mississippi river, who declare their intention of removing, shall be taken by a commissioner appointed by the president of the United States, and a commissioner appointed by the Cherokees on the Arkansas river; and the census of the Cherokees on the Arkansas river, and those removing there, and who, at that time, declare their intention of removing there, shall be taken by a commissioner appointed by the president of the United States, and one appointed by the Cherokees east of the Mississippi river.

[The Cherokee Nation *vs.* The State of Georgia.]

Art. 4. The contracting parties do also stipulate that the annuity due from the United States to the whole Cherokee nation for the year one thousand eight hundred and eighteen, is to be divided between the two parts of the nation, in proportion to their numbers, agreeably to the stipulations contained in the third article of this treaty; and to be continued to be divided thereafter in proportion to their numbers; and the lands to be apportioned and surrendered to the United States, agreeably to the aforesaid enumeration, as the proportionate part, agreeably to their numbers, to which those who have removed, and who declare their intention to remove, have a just right, including these with the lands ceded in the first and second articles of this treaty.

Art. 5. The United States bind themselves, in exchange for the lands ceded in the first and second articles hereof, to give to that part of the Cherokee nation on the Arkansas, as much land on said river and White river as they have or may hereafter receive from the Cherokee nation east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas, agreeably to their numbers; which is to commence on the north side of the Arkansas river, at the mouth of Point Remove, or Budwell's Old Place; thence, by a straight line, northwardly, to strike Chataunga mountain, or the hill first above Shield's Ferry, on White river, running up and between said rivers for compliment, the banks of which rivers to be the lines; and to have the above line, from the point of beginning to the point on White river, run and marked, which shall be done soon after the ratification of this treaty; and all citizens of the United States, except Mrs P. Lovely, who is to remain where she lives during life, removed from within the bounds as above named. And it is further stipulated, that the treaties heretofore between the Cherokee nation and the United States are to continue in full force with both parts of the nation, and both parts thereof entitled to all the immunities and privileges which the old nation enjoyed under the aforesaid treaties; the United States reserving the right of establishing factories, a military post, and roads, within the boundaries above defined.

Art. 6. The United States do also bind themselves to give to all the poor warriors who may remove to the western side of the Mississippi river, one rifle gun and ammunition; one blanket and one brass kettle; or, in lieu of the brass kettle, a beaver trap; which is to be considered as a full compensation for the improvements which they may leave; which articles are to be delivered at such point as the president of the United States may direct: and to aid in the removal of the emigrants they further agree to furnish flat bottomed boats and provisions sufficient for that purpose: and to those emigrants whose improvements add real value to their lands, the United States agree to pay a full valuation for the same, which is to be ascertained by a commissioner appointed by the president of the United States for that purpose, and paid for as soon after the ratification of this treaty as practicable. The boats and provisions promised to the emigrants are to be furnished by the agent on the Tennessee river, at such time and place as the emigrants may notify him of; and it shall be his duty to furnish the same.

Art. 7. And for all improvements which add real value to the lands lying within the boundaries ceded to the United States, by the first and second articles of this treaty, the United States do agree to pay for at the time, and to be valued in the same manner, as stipulated in the sixth article of this treaty; or, in lieu thereof, to give in exchange improvements of equal value which the emigrants may leave, and for which they are to receive pay. And it is farther stipulated, that all these improvements, left by the emigrants within the bounds of the Cherokee nation east of the Mississippi river, which add real value to the lands, and for

which the United States shall give a consideration, and not so exchanged, shall be rented to the Indians by the agent, year after year, for the benefit of the poor and decrepid of that part of the nation east of the Mississippi river, until surrendered by the nation, or to the nation. And it is further agreed, that the said Cherokee nation shall not be called upon for any part of the consideration paid or said improvements at any future period.

Art. 8. And to each and every head of any Indian family residing on the east side of the Mississippi river, on the lands that are now, or may hereafter be, surrendered to the United States, who may wish to become citizens of the United States, the United States do agree to give a reservation of six hundred and forty acres of land, in a square, to include their improvements, which are to be as near the centre thereof as practicable, in which they will have a life estate, with a reversion in fee simple to their children, reserving to the widow her dower, the register of whose names is to be filed in the office of the Cherokee agent, which shall be kept open until the census is taken as stipulated in the third article of this treaty. Provided, that if any of the heads of families, for whom reservations may be made, should remove therefrom, then, in that case, the right to revert to the United States. And provided further, that the land which may be reserved under this article be deducted from the amount which has been ceded under the first and second articles of this treaty.

Art. 9. It is also provided by the contracting parties, that nothing in the foregoing articles shall be construed so as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein.

Art. 10. The whole of the Cherokee nation do hereby cede to the United States all right, title and claim to all reservations made to Doublehead and others, which were reserved to them by a treaty made and entered into at the city of Washington, bearing date the seventh of January one thousand eight hundred and six.

Art. 11. It is further agreed that the boundary lines of the lands ceded to the United States by the first and second articles of this treaty, and the boundary line of the lands ceded by the United States in the fifth article of this treaty, are to be run and marked by a commissioner or commissioners appointed by the president of the United States, who shall be accompanied by such commissioners as the Cherokees may appoint; due notice thereof to be given to the nation.

Art. 12. The United States do also bind themselves to prevent the intrusion of any of their citizens within the lands ceded by the first and second articles of this treaty, until the same shall be ratified by the president and senate of the United States, and duly promulgated.

Art. 13. The contracting parties do also stipulate that this treaty shall take effect and be obligatory on the contracting parties so soon as the same shall be ratified by the president of the United States, by and with the advice and consent of the senate of the United States.

In witness of all and every thing herein determined, by and between the before recited contracting parties, we have, in full and open council, at the Cherokee Agency, this eighth day of July, A. D. one thousand eight hundred and seventeen, set our hands and seals.

Signed and sealed by the United States commissioners, by thirty-one chiefs, head men and warriors of the Cherokee nation east of the Mississippi river, and by fifteen chiefs, head men, and warriors of the Cherokees on the Arkansas river.

[The Cherokee Nation *vs.* The State of Georgia.]

TREATY OF 27 FEBRUARY 1819.

Articles of a Convention made between John C. Calhoun, secretary of war, being especially authorized therefor by the president of the United States, and the undersigned chiefs and head men of the Cherokee nation of Indians, duly authorized and empowered by said nation, at the city of Washington, on the twenty-seventh day of February in the year of our Lord one thousand eight hundred and nineteen.

Whereas a greater part of the Cherokee nation have expressed an earnest desire to remain on this side of the Mississippi, and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, signed the eighth of July eighteen hundred and seventeen, might, without further delay, or the trouble or expense of taking the census, as stipulated in the said treaty, be finally adjusted, have offered to cede to the United States a tract of country at least as extensive as that which they probably are entitled to under its provisions, the contracting parties have agreed to and concluded the following articles:

Art. 1. The Cherokee nation cedes to the United States all of their lands lying north and east of the following line, viz. beginning on the Tennessee river, at the point where the Cherokee boundary with Madison county, in the Alabama territory, joins the same; thence, along the main channel of said river, to the mouth of the Hiwassee; thence, along its main channel, to the first hill which closes in on said river, about two miles above Hiwassee Old Town: thence, along the ridge which divides the waters of the Hiwassee and Little Tellico, to the Tennessee river at Tallassee; thence, along the main channel, to the junction of the Cowee and Nanteyalee; thence, along the ridge in the fork of said river, to the top of the Blue Ridge; thence, along the Blue Ridge, to the Unicoy Turnpike Road; thence, by a straight line, to the nearest main source of the Chestatee; thence, along its main channel, to the Chatahouchee; and thence to the Creek boundary; it being understood that all the islands in the Chestatee, and the parts of the Tennessee and Hiwassee (with the exception of Jolly's Island, in the Tennessee, near the mouth of the Hiwassee), which constitute a portion of the present boundary, belong to the Cherokee nation: and it is also understood, that the reservations contained in the second article of the treaty of Tellico, signed the twenty-fifth October eighteen hundred and five, and a tract equal to twelve miles square, to be located by commencing at the point formed by the intersection of the boundary line of Madison county already mentioned, and the north bank of the Tennessee river; thence, along the said line, and up the said river, twelve miles; are ceded to the United States, in trust for the Cherokee nation, as a school fund; to be sold by the United States, and the proceeds vested as is hereafter provided in the fourth article of this treaty; and also, that the rights vested in the Unicoy Turnpike Company, by the Cherokee nation, according to certified copies of the instruments securing the rights, and herewith annexed, are not to be affected by this treaty; and it is further understood and agreed by the said parties, that the lands hereby ceded by the Cherokee nation, are in full satisfaction of all claims which the United States have on them, on account of the cession to a part of their nation who have or may hereafter emi-

grate to the Arkansas; and this treaty is a final adjustment of that of the eighth of July eighteen hundred and seventeen.

Art. 2. The United States agree to pay, according to the stipulations contained in the treaty of the eighth of July eighteen hundred and seventeen, for all improvements on land lying within the country ceded by the Cherokees, which add real value to the land, and do agree to allow a reservation of six hundred and forty acres to each head of any Indian family residing within the ceded territory, those enrolled for the Arkansas excepted, who choose to become citizens of the United States, in the manner stipulated in said treaty.

Art. 3. It is also understood and agreed by the contracting parties, that a reservation, in fee simple, of six hundred and forty acres square, with the exception of Major Walker's, which is to be located as is hereafter provided, to include their improvements, and which are to be as near the centre thereof as possible, shall be made to each of the persons whose names are inscribed on the certified list annexed to this treaty, all of whom are believed to be persons of industry, and capable of managing their property with discretion, and have, with few exceptions, made considerable improvements on the tracts reserved. The reservations are made on the condition, that those for whom they are intended shall notify, in writing, to the agent for the Cherokee nation, within six months after the ratification of this treaty, that it is their intention to continue to reside permanently on the land reserved.

The reservation for Lewis Ross, so to be laid off as to include his house, and out-buildings, and ferry adjoining the Cherokee Agency, reserving to the United States all public property there, and the continuance of the said Agency where it now is, during the pleasure of the Government; and Major Walker's, so as to include his dwelling house and ferry: for Major Walker, an additional reservation is made, of six hundred and forty acres square, to include his grist and saw mill; the land is poor, and principally valuable for its timber. In addition to the above reservations, the following are made, in fee simple; the persons for whom they are intended not residing on the same: To Cabbin Smith, six hundred and forty acres, to be laid off in equal parts, on both sides of his ferry on Tellico, commonly called Blair's ferry; to John Ross, six hundred and forty acres, to be laid off so as to include the Big island in Tennessee river, being the first below Tellico—which tracts of land were given many years since, by the Cherokee nation, to them; to Mrs Eliza Ross, step daughter of Major Walker, six hundred and forty acres square, to be located on the river below and adjoining Major Walker's; to Margaret Morgan, six hundred and forty acres square, to be located on the west of, and adjoining, James Riley's reservation; to George Harlin, six hundred and forty acres square, to be located west of, and adjoining, the reservation of Margaret Morgan; to James Lowry, six hundred and forty acres square, to be located at Crow Moeker's old place, at the foot of Cumberland mountain; to Susanna Lowry, six hundred and forty acres, to be located at the Toll Bridge on Battle Creek; to Nicholas Byers, six hundred and forty acres, including the Toqua island, to be located on the north bank of the Tennessee, opposite to said island.

Art. 4. The United States stipulate that the reservations, and the tract reserved for a school fund, in the first article of this treaty, shall be surveyed and sold in the same manner, and on the same terms, with the public lands of the United States, and the proceeds vested, under the direction of the President of the United States, in the stock of the United States, or such other stock as he may deem most advantageous to the Cherokee nation. The interest or dividend on said stock shall be applied, under his direction, in the manner which he shall

judge best calculated to diffuse the benefits of education among the Cherokee nation on this side of the Mississippi.

Art. 5. It is agreed that such boundary lines as may be necessary to designate the lands ceded by the first article of this treaty, may be run by a commissioner or commissioners, to be appointed by the president of the United States, who shall be accompanied by such commissioners as the Cherokees may appoint, due notice thereof to be given to the nation; and that the leases which have been made under the treaty of the eighth July eighteen hundred and seventeen, of land lying within the portion of country reserved to the Cherokees, to be void; and that all white people who have intruded, or may hereafter intrude, on the lands reserved for the Cherokees, shall be removed by the United States, and proceeded against, according to the provisions of the act passed thirtieth March eighteen hundred and two, entitled "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

Art. 6. The contracting parties agree, that the annuity to the Cherokee nation shall be paid, two-thirds to the Cherokees east of the Mississippi, and one-third to the Cherokees west of that river, as it is estimated that those who have emigrated, and who have enrolled for emigration, constitute one-third of the whole nation; but, if the Cherokees west of the Mississippi object to this distribution, of which due notice shall be given them, before the expiration of one year after the ratification of this treaty, then the census, solely for distributing the annuity, shall be taken at such times, and in such manner, as the president of the United States may designate.

Art. 7. The United States, in order to afford the Cherokees who reside on the lands ceded by this treaty, time to cultivate their crop next summer, and for those who do not choose to take reservations, to remove, bind themselves to prevent the intrusion of their citizens on the ceded land before the first of January next.

Art. 8. This treaty to be binding on the contracting parties so soon as it is ratified by the President of the United States, by and with the advice and consent of the Senate.

Done at the place, and on the day and year, above written.

I hereby certify, that I am, either personally, or by information on which I can rely, acquainted with the persons before named in the third article, all of whom I believe to be persons of industry, and capable of managing their property with discretion; and who have, with few exceptions, long resided on the tracts reserved, and made considerable improvements thereon.

RETURN J. MEIGS,
Agent in the Cherokee Nation.

Cherokee Agency, Hiwassee Garrison.

We, the undersigned Chiefs and Counsellors of the Cherokees in full council assembled, do hereby give, grant and make over, unto Nicholas Byers and David Russell, who are agents in behalf of the states of Tennessee and Georgia, full power and authority to establish a turnpike company, to be composed of them, the said Nicholas and David, Arthur Henly, John Lowry, Atto, and one other person, by them to be hereafter named, in behalf of the state of Georgia; and the above named persons are authorized to nominate five proper and fit persons, natives of the Cherokees, who, together with the white men aforesaid, are

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to constitute the company; which said company, when thus established, are hereby fully authorized by us to lay out and open a road from the most suitable point on the Tennessee river, to be directed the nearest and best way to the highest point of navigation on the Tugulo river; which said road, when opened and established, shall continue and remain a free and public highway, unmolested by us, to the interest and benefit of the said company, and their successors for the full term of twenty years, yet to come, after the same may be open and complete; after which time, said road, with all its advantages, shall be surrendered up, and revested in, the said Cherokee Nation. And the said company shall have leave, and are hereby authorized, to erect their public stands or houses of entertainment, on said road: that is to say, one at each end, and one in the middle, or as nearly so as a good situation will permit; with leave also to cultivate one hundred acres of land at each end of the road, and fifty acres at the middle stand, with a privilege of a sufficiency of timber for the use and consumption of said stands. And the said turnpike company do hereby agree to pay the sum of one hundred and sixty dollars yearly to the Cherokee nation, for the aforesaid privilege, to commence after said road is opened and in complete operation. The said company are to have the benefit of one ferry on Tennessee river, and such other ferry or ferries as are necessary on said road; and, likewise, said company shall have the exclusive privilege of trading on said road during the aforesaid term of time.

In testimony of our full consent to all and singular the above named privileges and advantages, we have hereunto set our hands, and affixed our seals, this eighth day of March eighteen hundred and thirteen.

The foregoing agreement and grant was amicably negotiated and concluded in my presence.

RETURN J. MEIGS.

Cherokee Agency, January 6, 1817.

We, the undersigned Chiefs of the Cherokee nation, do hereby grant unto Nicholas Byers, Arthur H. Henly, and David Russell, proprietors of the Unicoy road to Georgia, the liberty of cultivating all the ground contained in the bend on the north side of Tennessee river, opposite and below Chota Old Town, together with the liberty to erect a grist mill on Four Mile Creek, for the use and benefit of said road, and the Cherokees in the neighbourhood thereof; for them, the said Byers, Henly, and Russell, to have and to hold the above privileges during the term of lease of the Unicoy road, also obtained from the Cherokees and sanctioned by the President of the United States.

The above instrument was executed in open Cherokee council, in my office, in January 1817.

RETURN J. MEIGS.

Cherokee Agency, 8th July 1817.

The use of the Unicoy road, so called, was for twenty years.

RETURN J. MEIGS.

Ratified, 10th March, 1819.

TREATY OF 24 OCTOBER 1824.

Articles of a Treaty between the United States of America and the Cherokee Indians.

Daniel Smith and Return J. Meigs, being commissioned by Thomas Jefferson, President of the United States, with powers of acting in behalf of the said United States, in arranging certain matters with the Cherokee nation of Indians; and the underwritten principal chiefs, representing the said nation, having met the said commissioners in a conference at Tellico, and having taken into their consideration certain propositions made to them by the said commissioners of the United States; the parties aforesaid have unanimously agreed and stipulated, as is definitely expressed in the following articles:

Art. 1. For the considerations hereinafter expressed, the Cherokee nation relinquish and cede to the United States, a tract of land bounding southerly on the boundary line between the state of Georgia and the said Cherokee nation, beginning at a point on the said boundary line northeasterly of the most northeast plantation, in the settlement known by the name of Wafford's settlement, and running at right angles with the said boundary line four miles in the Cherokee lands; thence, at right angles, southwesterly, and parallel to the first mentioned boundary line, so far as that a line, to be run at right angles southerly to the said first mentioned boundary line, shall include, in this cession, all the plantations in Wafford's settlement, so called, as aforesaid.

Art. 2. For and in consideration of the relinquishment and cession, as expressed in the first article, the United States, upon signing the present treaty, shall cause to be delivered to the Cherokees, useful goods, wares, and merchandize, to the amount of five thousand dollars, or that sum in money, at the option (timely signified) of the Cherokees, and shall, also, cause to be delivered, annually to them, other useful goods to the amount of one thousand dollars, or money to that amount, at the option of the Cherokees, timely notice thereof being given, in addition to the annuity heretofore stipulated, and to be delivered at the usual time of their receiving their annuity.

Ratified, 17th May 1824.

APPENDIX, No. III.

ACT OF CONGRESS OF THE UNITED STATES, PASSED MARCH 30, 1802.

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.

Section 1. Be it enacted, &c. That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked in all such places as the president of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of the Cayahoga river on lake Erie, and running thence, up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence down that branch to the crossing place above Fort Lawrence; thence westwardly, to a fork of that branch of the Great Miami river running into the Ohio; at or near which fork stood Laromie's store, and where commences the portage, between the Miami of the Ohio and St Mary's river, which is a branch of the Miami, which runs into lake Erie; thence, a westwardly course, to Fort Recovery, which stands on a branch of the Wabash; thence, southwestwardly, in a direct line to the Ohio, so as to intersect that river opposite the mouth of Kentucky or Cuttawa river; thence, down the said river Ohio, to the tract of one hundred and fifty thousand acres, near the rapids of the Ohio, which has been assigned to General Clarke, for the use of himself and his warriors; thence, around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio, thence, down the same, to a point opposite the high lands, or ridge, between the mouth of the Cumberland and Tennessee rivers; thence, southeastwardly, on the said ridge, to a point from whence a southwest line will strike the mouth of Duck river; thence, still eastwardly, on the said ridge, to a point forty miles above Nashville; thence, northeast, to Cumberland river; thence, up the said river, to where the Kentucky road crosses the same; thence, to the Cumberland Mountain, at the point of Campbell's line; thence, in a southwestwardly direction, along the foot of the Cumberland Mountain, to Emory's river; thence, down the same, to its junction with the river Clinch; thence, down the river Clinch to Hawkins's line; thence, along the same to a white oak, marked one mile tree; thence, south, fifty-one degrees west, three hundred and twenty-eight chains, to a large ash tree on the bank of the river Tennessee, one mile below Southwest Point; thence, up the north east margin of the river Tennessee (not including islands) to the Wild Cat Rock, below Tellico block house; thence, in a direct line, to the Militia Spring, near

the Maryville road leading from Tellico; thence, from the said Spring to the Chilhowee mountain, by a line so to be run as will leave all the farms on Nine Mile Creek to the northward and eastward of it, and to be continued along the Chilhowee mountain until it strikes Hawkins's line; thence, along the said line, to the great Iron Mountain; and from the top of which a line to be continued, in a southeastwardly course, to where the most southern branch of Little river crosses the divisional line to Tugaloo river; thence, along the South Carolina Indian boundary, to and over the Ocunna mountain, in a southwest course, to Tugaloo river; thence, in a direct line, to the top of Currahee mountain, where the Creek line passes it; thence, to the head or source of the main south branch of the Oconee river, called the Appalachee; thence, down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence, down the middle of the said Altamaha, to the old line on the said river; and thence, along the said old line, to the river St Mary's: Provided always, that if the boundary line between the said Indian tribes and the United States shall, at any time hereafter, be varied by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act shall be construed to apply to the said line so to be varied, in the same manner as said provisions apply, by force of this act, to the boundary line herein before recited.

Sect. 2. That if any citizen of, or other person resident in, the United States, or either of the territorial districts of the United States, shall cross over, or go within, the said boundary line, to hunt, or in any wise destroy the game; or shall drive, or otherwise convey, any stock of horses or cattle, to range on any lands allotted or secured, by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

Sect. 3. That if any such citizen, or other person, shall go into any country which is allotted or secured, by treaty, as aforesaid, to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest post on the frontiers, or such other person as the president of the United States may, from time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned not exceeding three months.

Sect. 4. That if any such citizen, or other person, shall go into any town, settlement, or territory, belonging, or secured, by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass, or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any state against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay, to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed: and if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value shall be paid out of the treasury of the United States: Provided, nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he

belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

Sect. 5. That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted, by treaty with the United States, to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment, not exceeding twelve months. And it shall, moreover, be lawful for the president of the United States to take such measures, and to employ such military force, as he may judge necessary, to remove from lands, belonging, or secured by treaty, as aforesaid, to any Indian tribe, any such citizen, or other person, who has made, or shall hereafter make, or attempt to make, a settlement thereon.

Sect. 6. That if any such citizen, or other person, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians, belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

Sect. 7. That no such citizen, or other person, shall be permitted to reside at any of the towns, or hunting camps, of any of the Indian tribes, as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the president of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, to such trader, who shall enter into bond, with one or more sureties, approved of by the superintendent, or person issuing such license, or by the president of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions as are, or shall be, made for the government of trade and intercourse with the Indian tribes: and the superintendent, or person issuing such license, shall have full power and authority to recal the same, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds as he may have taken, on the breach of any condition therein contained.

Sect. 8. That any such citizen, or other person, who shall attempt to reside in any town or hunting camp, of any of the Indian tribes, as a trader, without such license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, and shall, moreover, be liable to a fine, not exceeding one hundred dollars, and to imprisonment, not exceeding thirty days.

Sect. 9. That if any such citizen, or other person, shall purchase, or receive, of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

Sect. 10. That no such citizen, or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license the superintendent, or such other person as the president shall appoint, is hereby authorized to grant, on the same terms, conditions, and restrictions, as other licenses are to be granted under this act: and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days

after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid; describing such horses, by their colour, height, and other natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed as above to purchase the same, shall forfeit the value of such horse.

Sect. 11. That no agent, superintendent, or other person, authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse to, or from, any Indian, excepting for and on account of the United States: and any person offending herein shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

Sect. 12. That no purchase, grant, lease, or other conveyance, of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution: and it shall be a misdemeanour in any person not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine, not exceeding one thousand dollars, and imprisonment not exceeding twelve months: Provided, nevertheless, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with, the Indians, the compensation to be made for their claims to lands within such state which shall be extinguished by the treaty.

Sect. 13. That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the president of the United States to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: Provided, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

Sect. 14. That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over across the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, horses, or other property belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence, or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the president of the United States shall authorize for that purpose; who upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the president of the United States, make application to

the nation or tribe to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, then it shall be the duty of such superintendent, or other person authorized as aforesaid, to make return of his doings to the president of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken as shall be proper to obtain satisfaction for the injury: and, in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guaranty to the party injured an eventual indemnification: Provided, always, that if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain, private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States for such indemnification: And provided, also, that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: And provided, further, that it shall be lawful for the president of the United States to deduct such sum or sums, as shall be paid for the property taken, stolen, or destroyed, by any such Indian, out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong.

Sect. 15. That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial, shall have, and are hereby invested with, full power and authority to hear and determine all crimes, offences, and misdemeanours, against this act; such courts proceeding therein in the same manner as if such crimes, offences, and misdemeanours, had been committed within the bounds of their respective districts: and in all cases where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States, in their respective districts, shall have, and are hereby invested with, like power to hear and determine the same, any law to the contrary notwithstanding. And in all cases where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner as the superior courts of such districts have in their ordinary sessions. And when the offender shall be apprehended or brought for trial into any of the United States, except Kentucky or Tennessee, it shall be lawful for the president of the United States to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district in which such offender may have been apprehended or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction, in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment in the same manner as such circuit court might or could do. And the district courts of Kentucky, Tennessee, and Maine, shall have jurisdiction of all crimes, offences, and misdemeanours, committed against this act, and shall proceed to trial and judgment in the same manner as the circuit courts of the United States.

Sect. 16. That it shall be lawful for the military force of the United States, to apprehend every person who shall or may be found in the Indian country, over

and beyond the said boundary line between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against in due course of law: Provided, that no person apprehended by military force, as aforesaid, shall be detained longer than five days after the arrest, and before removal. And all officers and soldiers who may have any such person or persons in custody, shall treat them with all the humanity which the circumstances will possibly permit; and every officer and soldier who shall be guilty of maltreating any such person while in custody, shall suffer such punishment as a court martial shall direct: Provided, that the officer having custody of such person or persons shall, if required by such person or persons, conduct him or them to the nearest judge of the supreme or superior court of any state, who, if the offence is bailable, shall take proper bail, if offered, returnable to the district court next to be holden in said district; which bail the said judge is hereby authorized to take, and which shall be liable to be estreated as any other recognizance for bail in any court of the United States; and if said judge shall refuse to act, or the person or persons fail to procure satisfactory bail, then the said person or persons are to be proceeded with according to the directions of this act.

Sect. 17. That if any person who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly authorized for that purpose, and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody for trial according to law.

Sect. 18. That the amount of fines, and duration of imprisonment, directed by this act as a punishment for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court before whom the trial shall be had; and that all fines and forfeitures which shall accrue under this act, shall be one half to the use of the informant, and the other half to the use of the United States: except where the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

Sect. 19. That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair the said road, under the direction or orders of the governor of said state, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement, or to the settlement on Obed's river (so called), provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the president of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said traces, or either of them, as the case may be, after which

the penalties of this act shall be incurred by every person travelling or being found on said traces, or either of them, to which the prohibition may apply within the Indian boundary, without a passport.

Sect. 20. That the president of the United States, be, and he is hereby, authorized to cause to be clearly ascertained, and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe, which now are, or hereafter may be, established by treaty.

Sect. 21. That the president of the United States be authorized to take such measures, from time to time, as to him may appear expedient, to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes, any thing herein contained to the contrary thereof notwithstanding.

Sect. 22. That this act shall be in force from the passage thereof; and so far as respects the proceedings under this act, it is to be understood that the act, entitled "an act to amend an act, entitled 'an act giving effect to the laws of the United States within the district of Tennessee,'" is not to operate.

APPENDIX, No. IV.

ACTS OF THE LEGISLATURE OF GEORGIA.

ACT OF 20 DECEMBER 1828.

An act to add the territory lying within the limits of this state, and occupied by the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall and Habersham, and to extend the laws of this state over the same, and for other purposes.

Sect. 1. Be it enacted by the senate and house of representatives of the state of Georgia, in general assembly met, and it is hereby enacted by the authority of the same; that from and after the passing of this act, all that part of the territory within the limits of this state, and which lies between the Alabama line and the old path leading from the Buzzard roost, on the Chattahoochee river, to Sally Hughes's, when the said path strikes the Alabama road; thence with said road to the boundary line of Georgia: be, and the same is hereby added to and shall become a part of the county of Carroll.

Sect. 2. And be it further enacted, that all that part of the said territory lying and being north of the last mentioned line, and south of the road running from Charles Tate's ferry, on Chattahoochee river, to Dick Roes, to where it intersects with the path aforesaid: be, and the same is hereby added and shall become a part of the county of De Kalb.

Sect. 3. And be it further enacted, that all that part of the said territory lying north of the last mentioned line, and south of the old federal road, be, and the same is hereby added and shall become a part of the county of Gwinett.

Sect. 4. And be it further enacted, that all that part of the said territory lying north of the said last mentioned line, and south of a line to begin on the Chestatee river, at the mouth of Yoholo creek; thence up said creek to the top of the Blue Ridge; thence to the head waters of Notley river; thence down said river to the boundary line of Georgia; be, and the same is hereby added to and shall become a part of the county of Hall.

Sect. 5. And be it further enacted, that all that part of the said territory lying north of the last mentioned line, within the limits of Georgia, be, and the same is hereby added to and shall become a part of the county of Habersham.

Sect. 6. And be it further enacted, that all the laws of this state be, and the same are hereby extended over said territory; and all white persons residing within the same shall, immediately after the passage of this act, be subject and liable to the operation of the said laws in the same manner as other citizens of the state, or the citizens of said counties respectively.

Sect. 7. And be it further enacted, that after the first day of June eighteen hundred and thirty, all Indians then and at that time residing in said territory, and within any one of the counties as aforesaid, shall be liable and subject to such laws and regulations as the legislature may hereafter prescribe.

Sect. 8. And be it further enacted, that all laws, usages, and customs, made, established, and enforced in the said territory, by the said Cherokee Indians, be, and the same are hereby on and after the first of June eighteen hundred and thirty, declared null and void.

Sect. 9. And be it further enacted, that no Indian or descendant of an Indian, residing within the Creek or Cherokee nations of Indians, shall be deemed a competent witness or party to any suit in any court created by the constitution or laws of this state to which a white man may be a party.

IRLEY HUDSON,
Speaker of the house of representatives
THOMAS STOCKS,
President of the senate.

Assented to December 20, 1828.
JOHN FORSYTH,
Governor.

ACT OF 19 DECEMBER 1829.

An act to add the territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall and Habersham, and to extend the laws of this state over the same, and to annul all laws and ordinances made by the Cherokee nation of Indians, and to provide for the compensation of officers serving legal process in said territory, and to regulate the testimony of Indians, and to repeal the ninth section of the act of eighteen hundred and twenty-eight upon this subject.

Sect. 1. Be it enacted by the senate and house of representatives of the state of Georgia, in general assembly met, and it is hereby enacted by the authority of the same; that from and after the passing of this act, all that part of the unlocated territory within the limits of this state, and which lies between the Alabama line and the old path leading from the Buzzard roost on the Chattahoochee, to Sally Hughes's, on the Hightower river, thence to Thomas Pelets, on the old federal road, thence with said road to the Alabama line: be, and the same is hereby added to and shall become a part of the county of Carroll.

Sect. 2. And be it further enacted, that all that part of said territory lying and being north of the last mentioned line, and south of the road running from Charles Gait's ferry on the Chattahoochee river to Dick Roes, to where it intersects with the path aforesaid: be, and the same is hereby added to and shall become a part of the county of De Kalb.

Sect. 3. And be it further enacted, that all that part of said territory lying north of the last mentioned line, and south of a line commencing at the mouth of Baldridge's creek, thence up said creek to its source; from thence to where the federal road crosses the Hightower; thence with said road to the Tennessee line: be, and the same is hereby added to and shall become a part of the county of Gwinett.

[The Cherokee Nation *vs.* The State of Georgia.]

Sect. 4. And be it further enacted, that all that part of said territory lying north of said last mentioned line, and south of a line to commence on the Chestatee river, at the mouth of Yoholo creek, thence up said creek to the top of the Blue ridge; thence to the head waters of Notley river; thence down said river to the boundary line of Georgia: be, and the same is hereby added to and shall become a part of the county of Hall.

Sect. 5. And be it further enacted, that all that part of said territory lying north of said last mentioned line, within the limits of this state, be, and the same is hereby added to and shall become a part of the county of Habersham.

Sect. 6. And be it further enacted, that all the laws, both civil and criminal, of this state, be, and the same are hereby extended over said portions of territory respectively; and all persons whatever residing within the same, shall, after the first day of June next, be subject and liable to the operation of said laws in the same manner as other citizens of this state, or the citizens of said counties respectively; and all writs and processes whatever, issued by the courts or officers of said courts, shall extend over and operate on the portions of territory hereby added to the same respectively.

Sect. 7. And be it further enacted, that after the first day of June next, all laws, ordinances, orders and regulations, of any kind whatever, made, passed, or enacted by the Cherokee Indians, either in general council or in any other way whatever, or by any authority whatever of said tribe, be, and the same are hereby declared to be null and void and of no effect, as if the same had never existed; and in all cases of indictment or civil suits, it shall not be lawful for the defendant to justify under any of said laws, ordinances, orders, or regulations; nor shall the courts of this state permit the same to be given in evidence on the trial of any suit whatever.

Sect. 8. And be it further enacted, that it shall not be lawful for any person or body of persons, by arbitrary power or by virtue of any pretended rule, ordinance, law or custom of said Cherokee nation, to prevent by threats, menaces, or other means, to endeavour to prevent any Indian of said nation residing within the chartered limits of this state, from enrolling as an emigrant, or actually emigrating or removing from said nation; nor shall it be lawful for any person or body of persons, by arbitrary power or by virtue of any pretended rule, ordinance, law or custom of said nation, to punish in any manner, or to molest either the person or property, or to abridge the rights or privileges of any Indian for enrolling his or her name as an emigrant, or for emigrating or intending to emigrate from said nation.

Sect. 9. And be it further enacted, that any person or body or persons offending against the provisions of the foregoing section, shall be guilty of a high misdemeanour, subject to indictment, and on conviction shall be punished by confinement in the common jail of any county of this state, or by confinement at hard labour in the penitentiary, for a term not exceeding four years, at the discretion of the court.

Sect. 10. And be it further enacted, that it shall not be lawful for any person or body of persons, by arbitrary power, or under colour of any pretended rule, ordinance, law or custom of said nation, to prevent or offer to prevent, or deter any Indian head man, chief or warrior of said nation, residing within the chartered limits of this state, from selling or ceding to the United States for the use of Georgia, the whole or any part of said territory, or to prevent or offer to prevent any Indian head man, chief or warrior, of said nation, residing as aforesaid, from

meeting in council or treaty, any commissioner or commissioners on the part of the United States, for any purpose whatever.

Sect. 11. And be it further enacted, that any person or body of persons offending against the provisions of the foregoing sections, shall be guilty of a high misdemeanour, subject to indictment, and on conviction shall be confined at hard labour in the penitentiary for not less than four nor longer than six years, at the discretion of the court.

Sect. 12. And be it further enacted, that it shall not be lawful for any person or body of persons, by arbitrary force or under colour of any pretended rules, ordinances, law, or custom of said nation, to take the life of any Indian residing as aforesaid, for enlisting as an emigrant; attempting to emigrate; ceding or attempting to cede, as aforesaid, the whole or any part of said territory; or meeting or attempting to meet in treaty or in council, as aforesaid, any commissioner or commissioners as aforesaid; and any person or body of persons offending against the provisions of this section shall be guilty of murder, subject to indictment, and on conviction shall suffer death by hanging.

Sect. 13. And be it further enacted, that should any of the foregoing offences be committed under colour of any pretended rules, ordinances, custom, or law of said nation, all persons acting therein, either as individuals or as pretended executive, ministerial or judicial officers, shall be deemed and considered as principals, and subject to the pains and penalties herein before described.

Sect. 14. And be it further enacted, that for all demands which may come within the jurisdiction of a magistrate's court suit may be brought for the same in the nearest district of the county to which the territory is hereby annexed, and all officers serving any legal process on any person living on any portion of the territory herein named shall be entitled to recover the sum of five cents for every mile he may ride to serve the same after crossing the present limits of said counties, in addition to the fees already allowed by law; and in case any of said officers should be resisted in the execution of any legal process issued by any court or magistrate, justice of the inferior court, or judge of the superior court of any of said counties, he is hereby authorised to call out a sufficient number of the militia of said counties to aid and protect him in the execution of this duty.

Sect. 15. And be it further enacted, that no Indian or descendant of any Indian, residing within the Creek or Cherokee nations of Indians, shall be deemed a competent witness in any court of this state to which a white person may be a party, except such white person resides within the said nation.

WARREN JOURDAN,
Speaker of the house of representatives.
THOMAS STOCKS,
President of the senate.

Assented to 19 December 1829.
GEORGE R. GILMER,
Governor.

[The Cherokee Nation *vs.* The State of Georgia.]

At the session of the legislature of the state of Georgia in 1830, *laws were passed relating to the Cherokee country, copies of which could not be procured, although diligent efforts have been made to obtain them. The following statement of these acts and of their purposes is abstracted from the supplemental bill, ante page* 32.

"An act to authorize the survey and disposition of lands within the limits of Georgia, in the occupancy of the Cherokee tribe of Indians, and all other unlocated lands within the limits of the said state, claimed as Creek land; and to authorize the governor to call out the military force to protect surveyors in the discharge of their duties; and to provide for the punishment of persons who may prevent, or attempt to prevent, any surveyor from performing his duties, as pointed out by this act, or who shall wilfully cut down or deface any marked trees, or remove any land-marks which may be made in pursuance of this act; and to protect the Indians in the peaceable possession of their improvements, and of the lots on which the same may be situate."

This act received the assent of the governor of the state on the 21st December 1830; and by its provisions surveyors are authorized to be appointed to go on the territory occupied by the Cherokees and all other unlocated land, within the limits of the state claimed as Creek land, and to lay it off into districts and sections, which are to be distributed by lottery among the people of Georgia, reserving the present occupancy of such improvements as the individuals of the Cherokee nation reside upon, with the lots on which such improvements stand, and excepting from such reservations such improvements as the Cherokees may have recently made near the gold mines.

"An act to declare void all contracts hereafter made with the Cherokee Indians, so far as the Indians are concerned;" which act received the assent of the governor of the state on the 23d December 1830.

By this act it is declared that no Cherokee shall be bound by any contract thereafter to be entered into with a white person or persons, nor be liable to be sued in any of the courts of law or equity of the state on such contract.

"An act to provide for the temporary disposal of the improvements and possessions purchased from certain Cherokee Indians and residents;" which act received the assent of the governor of the state on the 22d December 1830.

By this act the governor of the state is authorized to take possession of improvements, under a treaty of the 6th May 1828, which was made between the Cherokee Indians west of the Mississippi and the United States. By the same act the governor is authorized to take possession of other improvements claimed by Georgia under other treaties.

"An act to prevent the exercise of assumed and arbitrary power by all persons under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the state within the aforesaid territory."

This act received the assent of the governor of the state on the 22d Decem

ber 1830. By this act it is made a high misdemeanour punishable by imprisonment in the penitentiary, at hard labour, for four years, for the Cherokees to call a council or legislative assembly in their territory, under their constitution and laws, or to hold such council or assembly, or to hold any court or tribunal whatever, or to serve process or execute the judgments of their own courts, with various other provisions of a like character. White persons are excluded from the territory, unless they go under a license from the governor of the state, and take the oath of allegiance to the state of Georgia, when they are authorized to reside within the limits of the Cherokees. The turnpike roads and toll bridges erected by the Cherokees are abolished. And the governor is authorized to station an armed military force in the territory to guard the gold mines in the country of the Cherokees, to which the state of Georgia asserts an exclusive right, and to enforce the laws of Georgia upon them.

"An act to authorize the governor to take possession of the gold, silver, and other mines, lying and being in that section of the chartered limits of Georgia, commonly called the Cherokee country, and those upon all other unappropriated lands of the state, and for punishing any person or persons who may hereafter be found trespassing upon the mines."

This act received the assent of the governor of the state on the 2d of December 1830. By the preamble to this act, the title to the mines in the Cherokee country is asserted to be in the state of Georgia. By its provisions twenty thousand dollars are appropriated, and placed at the disposal of the governor, to enable him to take possession of these mines; and it is made a crime in the Cherokees, punishable by imprisonment in the penitentiary of Georgia, at hard labour, for four years, to work those mines.

THE END.